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84-1859

No. .....

In The

Supreme Court of the United States

October Term, 1984

STUART MARSH,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF FLINT, a Public Corporation; LEO MACKSOOD, individually and as President of the Board of Education of the City of Flint; UNITED TEACHERS OF FLINT, INC., a Michigan Corporation; HAROLD KEIM, individually and as President of United Teachers of Flint, Inc.; LANE HOTCHKISS, individually and as Chief Negotiator and Grievance Officer of United Teachers of Flint, Inc.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

—AND APPENDIX—

CONSTANCE E. BROOKS
MOUNTAIN STATES LEGAL FOUNDATION
1200 Lincoln Street, Suite 600
Denver, Colorado 80203
(303) 861-0244

K. PRESTON OADE, JR.
(Counsel of Record)
BRADLEY, CAMPBELL & CARNEY
1717 Washington Ave.
Golden, Colorado 80401
(303) 278-3300

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

56PP

QUESTION PRESENTED

Does the Constitution permit a public employer to adopt an explicit racial quota for reductions in the school counselor staff where the said quota is not based on any judicial or administrative findings of discrimination but was adopted solely to maintain a racial balance consistent with the percentage of minorities in the general student body?

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The opinion and order of which review is sought is unpublished and is reproduced at pages 2a-6a of the Appendix. The District Court opinion is reported as *Marsh v. Board of Education*, 581 F. Supp. 614 (E.D. Mich. 1984), and is included in the Appendix at pages 6a-36a.

JURISDICTION

The U. S. Court of Appeals for the Sixth Circuit filed its opinion and order in this case on April 4, 1985, and issued judgment against Petitioner on April 26, 1985.

This Court's jurisdiction arises pursuant to 28 U.S.C. § 1254(1)(1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This action is based upon the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which provides in pertinent part, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The principal statutory provision involved is 42 U.S.C. § 1983 (1978), which provides in pertinent part that

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges,

> or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

———o———

STATEMENT OF THE CASE

A. Facts and Background

This case challenges the constitutionality of a racial quota adopted by the Respondents which requires that reductions in force among the Flint Public Schools' counseling staff must be tailored to maintain a racial balance between the counselor/teacher staff and the general student body. This racial criteria was applied twice to demote Petitioner Marsh from his counselor position, both times in favor of less-senior black counselors. The case thus presents issues and facts similar to a case presently before this Court, *Wygant v. Jackson Board of Education,* 746 F.2d 1152 (6th Cir. 1984), *cert. granted* 53 U.S.L.W. 3727 (April 15, 1985) (No. 84-1340).

Petitioner Stuart Marsh is a 60 year-old white male who has been employed by the Flint School District since 1965. In 1969, he was promoted to school guidance counselor after completing special training and securing special certification to qualify for the more desirable counselor position. In 1980, after eleven years of ably performing his duties as a student counselor, Marsh was involuntarily removed from his position and assigned to classroom duties pursuant to racial balancing provisions in the Master Teacher Contract.

Marsh was reappointed to a counselor position during the 1981-1982 school year, but was again demoted to the classroom for all of the 1983-1984 school year. He was again appointed to counselor for the 1984-1985 school year, but was required to divide his time and duties between two geographically separated schools because he had lost the competitive seniority which would have allowed him to bid for a more desirable job assignment.[1] Under the explicit racial criteria of the Master Teacher Contract, white guidance counselors such as Marsh are at all times in danger of losing their positions, depending upon staff needs and changing racial demographics, in favor of less senior black counselors.

The racial provisions [set out at App. 2a] were first adopted in the 1979-82 Master Teacher Contract, which was entered into by Respondent Flint Board of Education (hereinafter "Board") and the United Teachers of Flint. The text of the relevant contract provision, Article XIV, Section I-1(c) has been renewed in the presently operative contract. [App. 1a].

This racial contract provision for counselors "is targeted to match the racial composition of the entire secondary teaching staff which in turn is to reflect the student racial composition." *Marsh v. Board of Educ. of City of Flint,* 581 F. Supp. 614, 616 (E. D. Mich. 1984.) [App. 8a]. The practical effect of this provision is to circumvent normal seniority rights for reductions in force

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[1]The Sixth Circuit ruled that the appeal is not moot because Marsh has outstanding claims for lost seniority and damages. App. 3a.

among counselor staff. Instead, *race* is the deciding factor for staff reductions.

Petitioner Marsh filed his complaint in federal district court in 1980, alleging violations of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§ 1981, 1983, 1985, and 1988.

B. Decisions Below

The district court decided the case on the defendant School Board's motion for summary judgment. After a brief hearing, the district court below entered judgment for defendants on all claims. *Marsh v. Board of Education*, 581 F. Supp. 614, 628 (E. D. Mich. 1984) [App. 36a].

The distict court merged the § 1981 and § 1983 claims into a single constitutional analysis, [App. 16a], and held that judgment for the Board was required under the controlling Sixth Circuit precedent, most notably *Bratton v. City of Detroit,* 704 F.2d 878 (6th Cir. 1983), *as modified on denial of reh'g en banc,* 712 F.2d 222 (6th Cir. 1983), *cert. denied,* 104 S. Ct. 703 (1984) [hereinafter referred to as *Bratton*].

Based on undisputed factual stipulations, the district court found that Marsh had in fact suffered a "demotion," [App. 8a], and that four black counselors with less seniority then Marsh were retained solely because of race "[i]n order to maintain the specified quota." *Id.* The district court observed that this constitutes "an explicit act of

racial discrimination visited on an American citizen.'"[2] [App. 36a].

Nonetheless, the district court held that the two-step equal protection analysis dictated by the Sixth Circuit required dismissal of Marsh's claims. The district court first determined that, essentially, the Sixth Circuits' decision in the *Bratton* case requires only a general showing of "societal discrimination" to sustain the use of racial preferences. [App. 20a].

The district court found that blacks were historically under-represented in the teaching and counseling sectors of the Flint School system relative to the percentage of black students.[3] [App. 20a]. The court emphasized, however, that there was no showing of a violation of the Constitutional or statutory rights of black students or teachers. [App. 21a].

To the contrary, the formal administrative findings in the record (Exhibit 7) demonstrate that the School

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[2]Because Marsh is the wrong color, he has twice been forced to assume rigorous new duties at the twilight of his career. When reassigned as a teacher, he was required to teach subjects such as English Lab, Speech, and American History which he had never taught before, as well as Civics, which he had not taught in 20 years. All of these duties required substantial extra preparation. As previously noted, this constant shifting of job duties between counselor and teacher also results in a loss of competitive seniority in bidding for particular job and school assignments.

[3]Although affirmative action recruiting has significantly increased the numbers of black teachers and counselors, by 1980 more than 59% of the district's students were black, while only 31% of the district's teachers were black. Similarly, fifteen (35%) of the fifty-two of the counselors were black. 581 F. Supp. at 621-22.

Board did *not* engage in past discrimination. These findings are in the form of an administrative law decision by the former Department of Health, Education, and Welfare (HEW). This administrative proceeding involved charges filed against the Flint School District alleging, *inter alia,* discriminatory employment practices, denial of equal educational opportunities, and segregation of the student body and teaching staff. Based upon an extensive factual record, the Administrative Law Judge (ALJ) found that since 1954 the Board had taken "demonstrable steps" to increase the number of black teachers (a category which includes counselors), and that "since 1959-60, employment of black teachers . . . has exceeded the approximate basis of the black adult population of the district." *See, In the Matter of Flint Community Schools, et al.*, HEW Docket No. S-115 at 97-99 (1977).

The ALJ further found that the increased employment of black teachers was the direct result of "an effective affirmative action plan." (*Id.* at 114). Although the percentage of black teachers did not yet completely mirror the proportion of black students in the student body, the ALJ found that this statistical disparity was due to insufficient numbers of qualified black teacher applicants (*Id.* at 98) coupled with the constantly changing racial demographics of the student body. (*Id.* at 99). Based on these findings the ALJ concluded that "Flint *has not discriminated* in the hire of black teachers," (*Id.*) (emphasis added) and ruled that "[n]o remedy thus can be required on this allegation." (*Id.* at 114).

Accordingly, other than mere statistical disparities, there are no findings of past discrimination in the record

and the only body competent to make such findings concluded that there was no discrimination that could justify the use of a race conscious remedy.

Nonetheless, following the controlling law in the Sixth Circuit, the district court concluded that the racial balancing quota was reasonably related to overcoming a substantial under-representation of blacks in the teaching and counseling sectors of the Flint school system. [App. 21a]. The district court then proceeded to the multi-faceted second step of the *Bratton* analysis to determine whether the use of race was itself "reasonable." [App. 22a]. Applying the four factors required by the Sixth Circuit, the district court concluded that under *Bratton*,

> 1. The quota *is* substantially related to the objective of remedying past societal discrimination, [App. 28a-29a];
>
> 2. The quota *is not* the only or least burdensome method to achieve this objective, [App. 29a-30a];
>
> 3. The quota *is not* temporary in nature, [App. 32a]; and
>
> 4. The quota *does not* "unnecessarily trammel" the rights of white counselors. *Id.*

In balancing these four factors, the district court concluded that "[i]t is all too clear that the leeway given to affirmative action by the Sixth Circuit is wide enough to save the present affirmative action plan from being held unconstitutional." [App. at 33a].

The Sixth Circuit affirmed without oral argument on the grounds that the appeal lacked merit. [App. at 3a-5a]. As regards Petitioners' challenge of the "reasonableness" standard—which virtually dictated the result below—the

Sixth Circuit held that Petitioner "does not dispute the *findings* of the district court," but instead presents arguments that "run counter to the established law of this Circuit." [App. at 5a] (emphasis added).

Petitioner requests that this Honorable Court review and reverse the judgment below.

REASONS FOR GRANTING THE PETITION

The Decision Below Conflicts With Decisions Of The Fifth And Seventh Circuits And Rests Squarely Upon An Erroneous Line Of Sixth Circuit Authority To Be Reviewed Next Term By This Court In Wygant v. Jackson Board of Education, No. 84-1340.

In affirming the judgment of the district court, the Sixth Circuit specifically relied upon its recent decision in a similar case now before this Court, *Wygant v. Jackson Board of Education,* 746 F.2d 1152 (6th Cir. 1984), *cert. granted,* 53 U.S.L.W. 3727 (April 15, 1985) [No. 84-1340]. Thus, according to the Sixth Circuit below [App. at 5a], the law enunciated in *Wygant* controls the result in the instant case.

Like the instant case, *Wygant* involves racial provisions in a teacher contract designed to maintain a racial balance between the respective percentages of minority teachers and students. As in the instant case, the explicit use of race is unsupported by any findings of past discrimination. To the contrary, in both cases there are either judicial findings (*Wygant*) or administrative findings (*Marsh*) demonstrating that the statistical dispari-

ties presented do *not* establish a constitutional or statutory violation of anyone's rights.

Thus, neither *Wygant* nor the instant case arises in the context of a segregated school system where the "nature of the violation determines the scope of the remedy". *Milliken v. Bradley,* 418 U.S. 717, 738 (1974); *Swann v. Sharlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1, 16 (1971). Rather, in the absence of *any* violation, the Sixth Circuit in both cases upheld an explicit racial contract provision that assigns burdens and benefits based solely on race, where the only stated "remedial" purpose is maintaining a racial balance in an already integrated school system. Both cases were decided by the Sixth Circuit under the same constitutional standard of "reasonableness", sustaining the use of race based upon a showing that it is "reasonably related" to overcoming statistical disparities that the record shows were *not* the result of discrimination.

In this regard, the Sixth Circuit's approval of statistical comparisons between student and faculty populations conflicts with this Courts' decision in *Hazelwood School District v. United States,* 433 U.S. 299, 308 n. 13 (1977). It also conflicts with decisions of the Fifth Circuit, where such comparisons have been flatly rejected as a basis for identifying discrimination in teacher employment. *Fort Bend Independent School District v. City of Stafford,* 651 F.2d 1133, 1138 (5th Cir. 1981); *Castaneda v. Pickard,* 648 F.2d 989, 1002 (5th Cir. 1981).

Further, the Sixth Circuits' decisions in both *Wygant* and the instant case *squarely conflict* with the holding of the Seventh Circuit in *Janowiak v. City of South Bend,* 36 FEP Cases (BNA) 737, (7th Cir. 1984), *petition for reh'g en banc filed,* No. 84-1321 (Jan. 7, 1985). Specific-

ally, the Sixth and Seventh Circuits reached opposite conclusions on whether a public employer may adopt racial preferences solely on the basis of statistical disparities and without findings of past discrimination.

The public employment preferential hiring program before the Seventh Circuit in *Janowiak* was adopted, as here, solely on the basis of statistical disparities and without specific findings of discrimination. In direct contrast to the decisions of the Sixth Circuit, the Seventh Circuit held that

> "[T]he government must demonstrate that its remedial program responds to a finding of past discrimination . . . Under the more exacting constitutional standard, this court now holds that *evidence of statistical disparity alone fails to prove past discrimination and cannot justify the adoption of a remedial plan that may discriminate against non-minorities.*" 36 FEP Cases at 742-43 (emphasis added).

Thus, like *Wygant,* the decision here conflicts with the requirement that the use of race must be remedial in nature. The Sixth Circuit approved the racial balancing provision of the Master Teacher Contract notwithstanding administrative findings demonstrating that the statistical disparities relied on were *insufficient* to show a constitutional or statutory violation. In doing so, the Sixth Circuit has ignored this Courts' holding that such a program "cannot pass muster unless . . . it provides a reasonable assurance that application of racial or ethnic criteria will be limited to accomplishing . . . remedial objectives." *Fullilove v. Klutznick*, 448 U.S. 448, 487 (1984).[4]

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[4]The Sixth Circuit has dismissed this Court's decision in *Fullilove* as "a plurality decision with little precedential value." *Bratton v. City of Detroit*, 704 F.2d 878, 885 (6th Cir. 1983).

In summary, the instant case presents the same constitutional issue and similar facts as *Wygant v. Jackson Board of Education,* No. 84-1340. The only discernable difference between *Wygant* and the instant case concerns the burdens assigned to white teachers (or white counselors) because they are the wrong color. The white teachers in *Wygant*—both men and women—lost their jobs; whereas Marsh twice lost his position as a counselor and remains vulnerable under the operation of the contract. In both situations, dedicated white professionals are always in jeopardy of losing their positions and suffer the constant burden of the least desirable school and classroom job assignments, notwithstanding their longer tenure. As put by the district court in commenting on your Petitioner's plight, this constitutes "an explicit act of racial discrimination visited on an American citizen." [App. at 36a]

CONCLUSION

The decision below was controlled by the law enunciated by the Sixth Circuit in a case to be heard by this Court, *Wygant v. Jackson Board of Education,* No. 84-1340. Like *Wygant,* the decision below squarely conflicts with decisions of other circuits as well as those of this Court. For these reasons, Petitioner respectfully urges

this Court to grant the Petition and hear this case along with *Wygant v. Jackson Board of Education, supra.*[5]

Respectfully submitted,

/s/ K. Preston Oade, Jr.
CONSTANCE E. BROOKS
MOUNTAIN STATES LEGAL FOUNDATION
1200 Lincoln Street, Suite 600
Denver, Colorado 80203
(303) 861-0244

K. PRESTON OADE, JR.
(Counsel of Record)
BRADLEY, CAMPBELL & CARNEY
1717 Washington Ave.
Golden, Colorado 80401
(303) 278-3300

Dated: May 24, 1985.

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[5]Counsel in the instant case is also counsel of record in *Wygant,* and is aware that the Court wants the briefs submitted well in advance of the arguments in October or November. If the Court were to grant the petition here, counsel represents that the brief on the merits will be filed as soon as possible and without any requested extensions.

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The relevant portions of Article XIV, § I-1(c) are the following:

1. *Layoff* .

. . . .

c. The order of layoff of nontenure teachers shall be determined by the Board. In secondary schools, the order of layoff of tenure teachers in each affected subject area shall be based upon the length of uninterrupted service in the Flint School District, i.e., the longest uninterrupted service in the District shall be the last in his/her subject area to be laid off. . . .

Where the length of service is the same, the tenure teacher in the secondary schools with the highest qualifications in his/her subject area will be retained. . . .

It is understood that should the Board determine to reduce staff among positions requiring more than a work year of thirty-nine (39) weeks as determined by the teacher's individual contract of employment (e.g., academic counselors, librarians) said reduction will be made in accord with the provisions of Article XVI. F-1; -2; -3 (herein defined for 40 week employees for purposes of layoff from 40 week employment to 39 week employment as a plus five percent from the ratio of minority teachers to majority teachers in the secondary level teacher labor pool in existence at the time of lay-off); -5 and Provision G, subject to the following limitations:

A teacher assigned to one of the aforesaid positions and who is laid off from a 40 week position and transferred into a 39 week position under Provisions (F) and (G) of this Article shall be granted an extra week's work in some appropriate

capacity for one (1) year subsequent to the lay-off.

The above provision will not be used to circumvent seniority (e.g., laying off a more senior minority counselor to retain a less senior minority counselor).

Additionally, if the area reduced is restaffed (moving toward the number the area was at before the decrease) district wide, the teacher(s) transferred out shall be guaranteed return to the area on the basis of seniority (last out, first back) for a period of three years.

No. 84-1240

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STUART MARSH,

Plaintiff-Appellant

v.

BOARD OF EDUCATION OF CITY OF FLINT; LEO MACKSOOD, INDIVIDUALLY AND AS PRESIDENT OF BOARD OF EDUCATION OF CITY OF FLINT; UNITED TEACHERS OF FLINT, INC.; HAROLD KEIM, INDIVIDUALLY AND AS PRESIDENT OF UNITED TEACHERS OF FLINT, INC.; AND LANE HOTCHKISS, INDIVIDUALLY AND AS CHIEF NEGOTIATOR AND GRIEVANCE OFFICER OF UNITED TEACHERS OF FLINT, INC.,

Defendants-Appellees

ORDER

(Filed April 4, 1985)

BEFORE: MARTIN and KRUPANSKY, Circuit Judges; and WEICK, Senior Circuit Judge

Plaintiff appeals the district court order of January 7, 1983 dismissing defendants Hotchkiss and Keim as well as the March 7, 1984 order granting summary judgment to defendants Macksood, Board of Education of the City of Flint and United Teachers of Flint. Defendants move this Court to dismiss plaintiff's appeal as moot. The case has been referred to a panel of the Court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of plaintiff's brief and the record, the panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

Plaintiff sought monetary, injunctive and declaratory relief against defendants for alleged violations of 42 U.S.C. §§ 1981, 1983, 1985(3) and the Fourteenth Amendment. Plaintiff, a white male and an employee of the defendant Board of Education of the City of Flint (hereinafter "Board"), asserted that his rights were violated when he was transferred from a counseling to a teaching position as a result of a voluntary affirmative action plan. The plan was part of a collective bargaining agreement negotiated between defendants Board and the United Teachers of Flint (hereinafter "Union").

Plaintiff filed a timely notice of appeal subsequent to the district court orders of January 7, 1983 and March 7, 1984. Defendants assert that plaintiff's appeal is moot because plaintiff was reinstated to his position as counsel-

or. It is not enough, however, that a primary issue is resolved if others are unsettled. *Powell v. McCormack,* 395 U.S. 486, 499 (1969). The reinstatement of plaintiff did not resolve his demand for monetary or injunctive relief. These issues remain alive on appeal.

On the merits, plaintiff appeals from the district court holdings that: 1) he could not challenge a voluntary affirmative action plan under 42 U.S.C. § 1985(3); and 2) his demotion pursuant to a reasonable affirmative action did not deny him equal protection of the law. In his brief, plaintiff did not address the court's holding as to his § 1985(3) claim. The court of appeals need not address an issue that a party has not briefed. *McGruder v. Necaise,* 733 F.2d 1146 (5th Cir. 1984); *Dean Hill Country Club, Inc. v. City of Knoxville,* 379 F.2d 321 (6th Cir.), *cert. denied,* 389 U.S. 975 (1967). Moreover, the issue has no merit. The district court's finding that § 1985(3) was not intended as a vehicle to attack voluntary affirmative action plans is well-grounded in the historical purpose of its enactment and the case law of this Circuit. *See e.g., United Brotherhood of Carpenters and Joiners of America v. Scott,* 463 U.S. 825 (1983); *Browder v. Tipton,* 630 F.2d 1149 (6th Cir. 1980); *Dunn v. State of Tennessee,* 697 F.2d 121 (6th Cir. 1982), *cert. denied,* 460 U.S. 1086 (1983).

Plaintiff's § 1981 and § 1983 arguments are also not persuasive. Section 1981 proscribes or permits the same degree of affirmative action as the equal protection clause. *Ohio Contractor's Association v. Keip,* 713 F.2d 167, 175 (6th Cir. 1983). To maintain an action under § 1983, an individual must show a constitutional deprivation under color of state law. *Sanderson v. Village of Greenhills,*

726 F.2d 284, 286 (6th Cir. 1984). The district court, therefore, combined the § 1981 and § 1983 analyses, and applied *Bratton v. City of Detroit,* 704 F.2d 878 (6th Cir.), *modified on denial of reh'g. en banc,* 712 F.2d 222 (6th Cir. 1983), *cert. denied,* — U.S. —, 104 S.Ct. 703 (1984) as the controlling case law.

Plaintiff does not dispute the findings of the district court. Instead, plaintiff challenges the analysis this Court used in *Bratton.* His first assertion is that *Bratton* improperly used a reasonableness, rather than strict scrutiny, standard. This Court, however, has recently reaffirmed the use of the reasonableness standard in determining whether an affirmative action plan passes constitutional muster. *See Vanguards of Cleveland v. City of Cleveland,* — F.2d —, No. 83-3091, Slip op. at 8 (6th Cir. January 23, 1985); *Wygant v. Jackson Board of Educ.,* 746 F.2d 1152 (6th Cir. 1984).

In addition, plaintiff's contention that the least restrictive means be used in remedying past discrimination is erroneous. *See Fullilove v. Klutznick,* 448 U.S. 448, 508 (1980) (Powell, J., concurring), *Ohio Contractors, supra* at 175-175. [sic] Finally, plaintiff's reliance on *Firefighters Local Union No. 784 v. Stotts,* 52 U.S.L.W. 4767 (1984) is also misplaced. This Court distinguishes an affirmative action plan which is the product of a court order from those plans which emanate from the collective bargaining process. *Wygant, supra* at 10.

In summary, all of plaintiff's arguments run counter to the established law of this Circuit. Accordingly, it is ORDERED that defendant's motion to dismiss plaintiff's appeal as moot is denied and the district court's judgment

is affirmed pursuant to Rule 9(d)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman, Clerk

ISSUED AS MANDATE: April 26, 1985
COSTS: NONE

A TRUE COPY. Attest: JOHN P. HEHMAN, Clerk
By /s/ Tom Bennignus, Deputy Clerk

MEMORANDUM OPINION AND ORDER

NEWBLATT, District Judge.

"Again and again Federal judges have spoken out, above a popular din or a Klansman's roar, as protectors of constitutional rights."[1]

I FACTS

A glorious new era dawned in the history of the American federal courts on February 20, 1961. On that date the Supreme Court rendered its decision in *Monroe v. Pape*,[2] and thus raised up the sleeping Lazarus of 42 U.S.C. § 1983.

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1. The quotation is taken from a December 14, 1983 New York Times editorial entitled "Democracy's Elite." The Court gratefully acknowledges that the article was called to its attention by the Honorable Avern Cohn, a federal judge who sits in the Eastern District of Michigan.

2. *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

Monroe lit up the darkness that all too often descends when government power goes unchecked by the judiciary. *Monroe* signalled that individuals in America—by virtue of section 1983—can obtain monetary and injunctive relief from the excesses of government.

It is not surprising that it has been the powerless—racial minorities, women, employees and prisoners—who have benefitted most from section 1983. It also is not surprising that section 1983 plaintiffs typically choose the federal courts as the forum in which to litigate their claims. Federal judges are insulated from political pressures by Article III of the constitution. In theory at least, society is prevented from intimidating federal judges from upholding the law. It thus is easy to understand why a lone plaintiff—supported by nothing more than the abstract principles codified in the constitution and civil rights laws—would assert to the limit his right to a federal court forum.

The case presently before this Court is a civil rights action. Stuart Marsh—the plaintiff—is a white man. But the constitution and the civil rights laws seem to guarantee that color is not relevant and that the government cannot confer benefits nor visit burdens on account of race. Stuart Marsh now asks the Court to make good on this guarantee.

Mr. Marsh, fifty-nine years of age, has been employed by the Flint Board of Education since 1965. After obtaining the appropriate credentials, he was promoted in 1969 to the position of counselor.

Mr. Marsh performed his duties ably and was continued in the counselor position until 1980. In that year,

Mr. Marsh was suddenly informed that he would no longer occupy a counselor's position and that he would be required to resume duties as a classroom teacher.

Mr. Marsh's demotion resulted from the operation of an affirmative action program designed to maintain a specified quota of black counselors in the Flint secondary school system. The pertinent affirmative action provision is set out in Article XIV, section I-1(c) of the 1979-1982 collective bargaining agreement[3] entered into by the Flint Board of Education and the United Teachers of Flint. Under this provision, the racial composition of the counselor and librarian staff of the Flint secondary school system is targeted to match the racial composition of the entire secondary teaching staff which in turn is to reflect the student racial composition. In order to maintain the specified quota, at least four black persons with less seniority than Mr. Marsh were retained as counselors in the 1980-1981 school year. It is not contested that these individuals were retained as counselors over Mr. Marsh on account of race.

In an effort to obtain redress, Mr. Marsh filed this lawsuit suing the following defendants: the Flint Board of Education; Leo Macksood, the President of the Board of Education; the United Teachers of Flint, Harold Klein, the President of the United Teachers of Flint; and Lane Hotchkiss, the chief negotiator and grievance officer of

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3. A copy of the collective bargaining agreement is filed as Exhibit 12 at docket entry #22. It is interesting to note that the agreement contains additional affirmative action provisions to Article XIV, section I-1(c). *See e.g.*, Appendix W to Exhibit 12. The only provision presently before the Court, however, is Article XIV, section I-1(c).

the United Teachers of Flint. Plaintiff's claims against Messrs. Keim and Hotchkiss have been dismissed in earlier orders of the Court. The remaining defendants are the Flint Board of Education, Mr. Macksood and the United Teachers Union.

Plaintiff has asserted 42 U.S.C. §§ 1981, 1983 and 1985(3) claims against the Board of Education and Mr. Macksood. Plaintiff alleges that the Board and Macksood applied an explicit racial classification in employment thereby violating both section 1981 and the equal protection clause of the Fourteenth Amendment. Plaintiff asserts his equal protection clause claim by way of 42 U.S.C. § 1983. Plaintiff also alleges that the Board and Mr. Macksood conspired to deprive him of rights protected by 42 U.S.C. § 1985(3). Finally, plaintiff alleges that the union—defendant United Teachers of Flint—violated 42 U.S.C. § 1981 by entering into the race based affirmative action agreement.

There are only minor disputes in the facts,[4] and since the essential facts relative to plaintiff's legal theories are beyond doubt established, it is entirely appropriate to resolve now, without a trial, the issue of whether plaintiff is or is not entitled to relief. Pending herein are motions for summary judgment filed by the three remaining defendants. The thorough and scholarly briefs filed by the very able counsel have been read. The Court also has ever so carefully studied and reflected upon the applicable body of law in dealing with the pending motions which are now before the Court.

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4. See pp. 2-3 of plaintiff's supplemental brief at docket entry #28.

II LEGAL ANALYSIS

A. *Plaintiff's 42 U.S.C. § 1985(3) Claim Against Defendants Board of Education and Macksood*

Plaintiff contends that the affirmative action plan at issue here operated to violate 42 U.S.C. § 1985(3). Resolving this issue requires construction of a statute famous for its opaque language. Assistance is afforded by some rather instructive precedent, for while section 1985(3) is not litigated as often as section 1983, it still has been the subject of a number of full Supreme Court opinions.[5]

Section 1985(3) protects against conspiracies aimed at certain classes of persons. Arguably there are two alternative reasons why plaintiff Marsh's section 1985(3) claim should be dismissed via summary judgment.

[1] First, it is noted that plaintiff's section 1985(3) claim arises out of a so-called conspiracy to racially discriminate against him in employment. In the case of *Great American Federal Savings v. Novotny,* 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979), the Supreme Court held that a person asserting a Title VII[6] claim of employment discrimination cannot also assert a claim under 42 U.S.C. § 1985(3). The *Novotny* court's language provided that

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5. *See e.g., United Brotherhood of Carpenters and Joiners v. Scott,* — U.S. —, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983); *Great American Savings & Loan Association v. Novotny,* 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979); *Griffin v. Breckenridge,* 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971).

6. *See Great American Savings & Loan Association v. Novotny,* 442 U.S. 366, 378, 99 S.Ct. 2345, 2352, 60 L.Ed.2d 957 (1979).

"deprivation of a right created by Title VII cannot be the basis for a cause of action under section 1985(3).'"[7]

Here, plaintiff never asserted a Title VII claim. Although Title VII—by dint of the 1972 amendments[8]—has been extended to cover public employers, plaintiff Marsh chose to rely solely on sections 1981 and 1983 rather than section 1985.

If *Novotny* were read to encompass all employment discrimination claims, dismissal of the section 1985(3) claim outright would be compelled. But as mentioned, *Novotny* deals with rights created by Title VII. Here, plaintiff's asserted right was not created by Title VII. Plaintiff is here asserting his equal protection clause right to be free from race based governmental discrimination. The genesis of this right is, of course, the dictum in the famous (or more appropriately, infamous) *Korematsu*[9] decision. By the time of the 1954 *Brown v. Board of Education*[10] decision, the right was firmly embedded in the equal protection clause.

In sum, plaintiff's racial discrimination claim was created by the Constitution rather than Title VII. It follows that *Novotny* does not mandate dismissal of plaintiff's section 1985(3) claim.

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7. Title VII of the 1964 Civil Rights Act, codified at 42 U.S.C. § 2000e *et seq.* Title VII is, of course, one of the major employment discrimination statutes.

8. Title VII was amended in 1972. *See* Act of March 24, 1972, 86 Stat. 103.

9. *Korematsu v. United States,* 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944).

10. *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

A more formidable defense is that plaintiff—under the facts of this case—is not within the protective ambit of section 1985(3). Recently, in *United Brotherhood of Carpenters and Joiners of America v. Scott*, — U.S. —, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983), the Supreme Court rendered an important opinion dealing with the protective scope of section 1985(3). *Scott* makes it clear that section 1985(3) only affords protection where the alleged conspiracy has a race or class based animus.

Section 1985(3) is the former section 2 of the Ku Klux Klan Act of 1871.[11] The Supreme Court has devoted hundreds of pages to analyzing the legislative history of this Act.[12] These discussions and this Court's own study of the 1871 Act[13] leave this Court entirely convinced that the overriding purpose of the Act was to protect the newly freed blacks from Ku Klux Klan violence and intimidation.

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11. Act of April 20, 1871, § 1, 17 Stat. 13.

12. For only a sample of this see, *Briscoe v. LaHue*, — U.S. —, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983); *Patsy v. Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982); *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979); *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). *See generally* the interesting section on 42 U.S.C. § 1983 in the new (fourth) edition of Professor Wright's Handbook on Federal Courts at § 22A. *See also* Blum, *From Monroe to Monell: Defining the Scope of Municipal Liability in Federal Courts*, 51 Temple Law Quarterly 409 (1978). Comment, *A Construction of Section 1985(3) in Light of Its Original Purpose*, 46 U.Chi.Law Rev. 402 (1979).

13. *See e.g., Riley v. Smith*, 570 F.Supp. 522, 525-526 (ED Mich.1983); *Clark v. Michigan Department of Corrections*, 555 F.Supp. 512, 514-517 (ED Mich.1982).

[2] Affirmative action is a modern phenomenon dating from the post World War II civil rights movement. Unlike the legislative debates surrounding Title VII of the 1964 Civil Rights Act, the debates concerning section 1985(3) do not reveal even a trace of concern over the issue of affirmative action. This is not to say that whites can under no circumstances enjoy the protection of this statute. Clearly, racial attacks against whites or other forms of concerted mob violence would be covered under section 1985(3). Here, however, the conclusion is compelled that it was not the statute's objective to strike down employment related affirmative action.

[3, 4] Before leaving this issue it is appropriate to stress that the Court is involved in statutory—rather than constitutional—interpretation. Consequently, attention is focused solely on the intent of the 1871 drafters[14] and on higher court interpretative decisions. The inquiry would be different were a constitutional provision at issue. This Court does not believe in strict historical interpretavism as championed by Professor Berger.[15] Instead, it is inclined toward a modified interpretavism with basic orig-

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14. It is basic that statutory intent should be the only inquiry in judicial statutory construction. *See Moll v. Parkside Livonia Credit Union*, 525 F.Supp. 785, 786 (ED Mich.1981). To quote John Hart Ely, if a judge behaves otherwise people should

> "conclude that he was not doing his job, and might even consider a call to the lunacy commission."

See Ely, *Democracy and Distrust: A Theory of Judicial Review*, 3 (1980).

15. *See generally* R. Berger, *Government By Judiciary* 10-12 (1980). Professor Berger's is the classic presentation of the strict interpretavist position.

inal principles as the guide but allowing for reasonable and natural expansion over time.[16] Under this approach the challenged affirmative action plan might very well fall if the Court were originally deciding the constitutional issue.[17] Here, however, the Court merely construes a statute, and easily arrives at the conclusion that, under the undisputed facts of this case, summary judgment must be granted on plaintiff's section 1985(3) claim.

B. *Plaintiff's 42 U.S.C. § 1981 Claim*

Plaintiff also has asserted a 42 U.S.C. § 1981 claim. Section 1981 first appeared as section 1 of the Civil Rights Act of 1866.[18] Like section 1985(3), section 1981 was intended to ameliorate the lives of the recently freed blacks of the south.[19] It follows that if the Court were construing this statute afresh, the Court's analysis would be very similar to the foregoing section 1985(3) analysis.

The Sixth Circuit Court of Appeals, however, has explicitly directed that in affirmative action cases, section 1981 is to be read as proscribing or permitting the same degree of affirmative action as the equal protection

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16. *See generally,* Grano, *Judicial Review and A Written Constitution,* 28 Wayne Law Rev. 1 (1981). *See also* Grano, *Rhode Island v. Innis, A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions,* 17 American Criminal Law Rev. 3-4 n. 19 (1979).

17. See nn. 50-73 and accompanying text *infra.*

18. Act of June 27, 1866, 14 Stat. 74.

19. *See Runyan v. McCray,* 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976). *See generally* Comment, *Developments in the Law*—Section 1981, 15 Harv.C.R.C.L.Law Rev. 29 (1980).

clause.[20] This reminds the Court of the famous *Bakke* case where five members of the United States Supreme Court held that Title VI of the 1964 Civil Rights Act runs parallel to the constitution's equal protection clause.[21] The Court must confess that it has trouble with this approach. Unless a statute explicitly incorporates the constitution—akin to 42 U.S.C. § 1983—the statute's meaning over time is bound to differ from the meaning of the constitution. This is because the constitution must evolve and grow with the needs of changing eras.[22] Nevertheless,

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20. *See Ohio Contractors Association v. Keip*, 713 F.2d 167 at 175 (CA6, 1983); *Detroit Police Officers Association v. Young*, 608 F.2d 671, 692 (CA6, 1981).

21. In *Bakke*, four justices—Justices Burger, Stewart, Stevens and Rehnquist—would have struck down the Cal-Davis medical school affirmative action program on the ground that it violated Title VI of the 1964 Civil Rights Act. These Justices never reached the constitutional issue. *See Regents of the University of California v. Bakke*, 438 U.S. 265, 408-421, 98 S.Ct. 2733, 2808-2815, 57 L.Ed.2d 750 (1978).

Justices Brennan, Marshall, Blackmun and White upheld the Davis plan under the equal protection clause. These Justices concluded that

> "Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself."

See id at 325, 98 S.Ct. at 2766. Justice Powell, in his noted *Bakke* swing opinion, took the same position. *See id* at 286-287, 98 S.Ct. at 2746.

22. Only a few observers would question this. *But see* R. Berger, *Government by Judiciary* (1980). The burning issue of modern constitutional law is the source of values that is to guide the historical evolution of the constitution. *See generally* Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980); Grano, *Judicial Review and A Written Constitution*, 28 Wayne Law Rev. 1 (1981); Perry, *Non Interpre-*

(Continued on following page)

the Sixth Circuit has spoken, and this Court is bound to obey. Therefore, the Court simply incorporates its analysis of the equal protection clause claim that is set out in section II-C of this opinion. The disposition of the section 1981 claim will be exactly the same as the disposition of plaintiff's section 1983 equal protection clause claim which will now be addressed.

C. *Plaintiff's 42 U.S.C. § 1983 Equal Protection Clause Claim*

The equal protection clause is the constitutional provision that deals with racial classifications enacted or otherwise advanced by the government.[23] Over time the equal protection clause claim has evolved such that it now proscribes other types of governmental classifications.[24] Nevertheless, the classic equal protection clause claim is that of racial discrimination.

(Continued from previous page)

tive Review in Human Rights Cases: A Functional Justification, 56 NY U.Law Rev. 278 (1981); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale Law Journal 1037 (1980).

23. *See University of California Regents v. Bakke*, 438 U.S. 265, 282-286, 98 S.Ct. 2733, 2744-2746, 57 L.Ed.2d 750 (1978) (opinion of Justice Powell).

24. *See e.g., Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (heightened judicial scrutiny for gender based state laws); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972) (heightened judicial scrutiny for state laws discriminating against illegitimate children). *See generally* Perry, *Modern Equal Protection: A Conceptualization and An Appraisal*, 79 Columbia Law Rev. 1023 (1979); Weidner, *The Equal Protection Clause: The Continuing Search for Judicial Standards*, 57 U.Det.J. Urb.L. 867 (1980).

In the present case the Court has been called upon to apply the equal protection clause to the Board of Education's affirmative action program for black counselors. The key precedent—the precedent that will guide much of this section of this opinion—is the recent Sixth Circuit case of *Bratton v. City of Detroit.*[25] In *Bratton* a Sixth Circuit panel consisting of Judges Jones, Merritt and Celebrezze decided the legality of the portion of the Detroit Police Department's affirmative action plan that establishes separate lists for black and white officers with respect to promotions from the rank of sergeant to the rank of lieutenant[26] *Bratton* upheld the Detroit Police Department's affirmative action program. In the process, the *Bratton* panel set out definite guidelines for analyzing affirmative action equal protection clause claims.

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25. 704 F.2d 878 (CA6) on rehearing, 712 F.2d 222 (CA6, 1983). A petition seeking certiorari was filed in *Bratton* and was denied by the Supreme Court on January 9, 1984. *See* — U.S. —, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984). It should perhaps be noted that the Supreme Court has granted certiorari and has recently heard oral arguments in the affirmative action oriented Sixth Circuit case of *Firefighters v. Stotts,* #82-206 (argued on December 6, 1983). The *Stotts* Sixth Circuit opinion—published at 679 F.2d 541 (CA6, 1982)—held that a district court may modify a consent decree to prevent layoffs from reducing the quota of minority firefighters specified in the consent decree.

Although very interesting, the *Stotts* issues are markedly different from the issues in the present case. Therefore, this opinion will not mention *Stotts* again.

26. A prior Sixth Circuit opinion—*Detroit Police Officers Association v. Young,* 608 F.2d 671 (CA6, 1979) *cert. denied,* 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981)—upheld the validity of the patrolman to sergeant portion of the Detroit Police Department affirmative action plan.

Bratton dictates a two-step equal protection clause affirmative action analysis.[27] This analysis will now be employed to determine whether the Board's affirmative action program passes constitutional muster.

[5] The first step of the *Bratton* analysis focuses on whether prior discrimination has created a genuine need for racial preferences. In resolving this issue, the reviewing court must carefully consider whether there is a sound basis for believing that minority group underrepresentation is "chronic."[28]

Before analyzing this issue, it is most appropriate to take a moment to look back over the wide horizon of employment discrimination law. This will be helpful in placing the *Bratton* first step in the proper perspective.

The classic employment discrimination case is one of disparate treatment based on race. In such a case the victim persuades the fact finder—which usually is a court—that individualized intentional discrimination has occurred.[29] This simple model—applicable to people like Adolph Plessy, Linda Brown, Alan Bakke and Brian Web-

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27. *See Bratton v. City of Detroit*, 704 F.2d 878, 884-898 (CA6, 1983).

28. *See id* at 886.

29. The basic disparate treatment single plaintiff model is discussed and analyzed in several Supreme Court cases. *See e.g., U.S. Postal Service v. Aikens*, — U.S. —, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *Furnco Construction Co. v. Waters*, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978).

er[30]—operates to rectify intentional and invidious racial discrimination directed at identifiable victims. Clearly, *Bratton* is not referring to this type of discrimination. If it were, the identifiable black victims of past discrimination could be pinpointed and awarded appropriate redress which may or may not have disadvantaged white persons. *Bratton*, however, refers to a much more general type of discrimination.

A second model of discrimination that has been recognized in employment discrimination law is pattern and practice discrimination. This type of discrimination—paradigmed in the famous *Teamsters*[31] case—involves systematic discrimination against a bounded set of workers occurring within a statute of limitations.

The *Teamsters* model is not nearly as discrete as the simple single victim discrimination model. Nevertheless, the *Teamsters* standard is much more difficult to meet than the standard specified in the first step analysis set forth in *Bratton*. Indeed, the *Bratton* panel hearkened to evidence of segregation in Detroit police practices that occurred "as far back as the city's first race riot in 1943."[32] When one considers the tragic American history in the

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30. The plaintiffs in the famous racial discrimination cases of *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896); *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); *University of California Regents v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978); *United Steelworkers of America v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979).

31. *See Teamsters v. U.S.*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977).

32. *See Bratton v. City of Detroit*, 704 F.2d 878, 888 (CA6, 1983).

area of race relations, it becomes obvious that virtually *every* industry and activity in both the public and private sectors located in states in which a substantial minority population has resided will fall within the *Bratton* standard of past discrimination. Indeed, *Bratton* prior discrimination is virtually equivalent to "social discrimination" as discussed in Justice Brennan's *Bakke* opinion.[33]

[6] Having determined just what it is applying, the Court is now prepared to apply the *Bratton* first step. In this respect careful note must be taken of the undisputed statistics in the record. These statistics clearly indicate that, for at least in excess of twenty years, black people have been substantially underrepresented in teaching and counseling sectors of the Flint school system. In 1959, for example, there were only twelve black teachers in the district's junior high schools and four black teachers in the district's high schools.[34] Furthermore, as the number of black teachers increased, these teachers were usually assigned to schools with predominantly black student populations.[35] By 1980, 59.2% of the district's students were black while only 31% of the district's city's teachers were black.[36]

The school district's record on the issue of black counselors was even less impressive. The first black

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33. *See University of California Regents v. Bakke,* 438 U.S. 265, 318, 98 S.Ct. 2733, 2762, 57 L.Ed.2d 750 (1978).

34. See Exhibit 1, p. 2 in the sheaf of Exhibits attached to defendants' March 14, 1983 brief at docket entry #22.

35. *See id.*

36. See affidavit of Stuart A. Boze, at ¶10. The affidavit is at the front of the docket entry #22 sheaf of Exhibits.

counselor was not hired until 1963. In 1966, of fifty-five counselors, only 3 were black.[37] In 1980, when the district's student population was 59.2% black, fifteen out of fifty-two counselors were black.[38]

In light of all this, there can be no doubt that the present affirmative action plan complies with the first part of the *Bratton* test. While not as compelling as the Detroit Police Department evidence, the School Board has certainly adduced evidence proving that there historically has been substantial underrepresentation of blacks as school counselors. From this the inference can be drawn that there has been a pattern of overt discrimination against blacks as teachers and counselors in the district.

The Court must, however, point out that it is *not* holding that an equal protection clause section 1983 racial discrimination claim could be sustained on this record by the black counselors in the Flint school system. Such a claim would be subject to a statute of limitations and rather rigorous evidentiary burdens.[39] Here, it is merely held that the historical discrimination in the school system

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37. *See* Boze affidavit at ¶11 at docket entry #22 sheaf of Exhibits.

38. *See* "Summary Sheet" included with Exhibit A at docket entry #22. *See also* ¶10 of the Boze affidavit at docket entry #22 sheaf of Exhibits.

39. Intentional racial discrimination is tested under the equal protection clause in basically the same manner as it is tested under Title VII. For discussions of the Title VII disparate treatment model, see *U.S. Postal Service v. Aikens*, — U.S. —, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207.

is enough to qualify as "past discrimination" within the meaning of *Bratton*. Like Justice Stewart's famous *Fullilove* dissent, *see Fullilove v. Klutznick*, 448 U.S. 448, 522-527, 100 S.Ct. 2758, 2797-2800, 65 L.Ed.2d 902 (Stewart J. dissenting), the present opinion recognizes that the type of past discrimination which "justifies" voluntary affirmative action is a far cry from the type of discrimination necessary to sustain an equal protection clause claim.

[7] Having concluded that the Board's affirmative action program comports with the first part of the *Bratton* test, the Court moves on to the second prong of the test—to determine whether the affirmative action plan is "reasonable" under *Bratton*.[40] *Bratton* reasonableness is tested by an analysis of two issues.[41] First, the reviewing court must determine whether white people are stigmatized by the minority preferences. Next, it must be determined whether the specific numerical goals of the affirmative action program are reasonable.

As to the stigma issue, the Court recognizes that it has before it one of the great issues of modern times. For in the America of today—from the oil fields of Louisiana to the factories of Detroit—people speak constantly of affirmative action and the effect that the racial preferences have on white people. For the Court to analyze adequately whether whites are really stigmatized by racial affirmative action, a look to the general subjects of race and race based governmental policies is necessary.

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40. *See Bratton v. City of Detroit*, 704 F.2d 878, 890 (CA 6, 1983).

41. *See id.*

Western history—for all its artistic and scientific glories—has been marked by racial strife. Curiously enough, racial conflicts seem to increase, rather than subside, as time moves on. The enslavement of the black race and the subjugation of the American Indian were mere preludes to the murderous racial relations of modern times. Indeed, writing in 1887, the French anthropologist Georges Vacher de Lepouge warned:[42]

> "The conflict of races is now about to start within nations . . . . I am convinced that in the next century people will slaughter each other by the millions because of a difference of a degree or two in the cephalic index. It is by this sign, which has replaced the biblical shibboleth and linguistic affinities, that men will be identified . . . and the last sentimentalist will be able to witness the most massive exterminations of peoples."[43]

The strange prophecy of Vacher de Lepouge has been borne out in the twentieth century. The ominous thunder of white hooded night riders, the thick Jim Crow statute books, the gas chamber horrors of Buchenwald, the concentration camps for Japanese-Americans . . . all

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42. As quoted and translated in Field, *Evangelist of Race: The Germanic Vision of Houston Stewart Chamberlain* (1981).

43. It should never be forgotten that governmental racism was not always the sole product of physical force and coercion. At times certain governments implemented racist policies with a clear majority mandate and with the support of prestigious scholars and writers such as Madison Grant, Joseph Gobineau and Houston Stewart Chamberlain. For a study of the almost mystical influence of Chamberlain's writings on government leaders in the western world, see Mr. Field's recent book cited at fn. 42 *supra*. *See also* Gosset, Race: *The History of an Idea in America*.

of this comes to mind with the subject of governments that have enacted laws predicated on race.[44]

In light of the past it is not surprising that many people believe that governments should be absolutely forbidden from enacting race based statutes. This view has been eloquently expressed by a number of excellent scholars[45] and has won the endorsement of such judicial luminaries as Justice Rehnquist,[46] Justice Stewart,[47] Justice Mosk[48] and Judge Van Graafiland.[49]

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44. The present opinion is not the only judicial opinion invoking such metaphors. In his *Fullilove* dissent, Justice Stevens wondered where the affirmative action lawmakers would look for methods to determine what racial group an affirmative action applicant would be placed in. This is what came to Justice Stevens' mind:

> "If the National Government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reich's Citizenship Law of November 14, 1935 . . .

See Fullilove v. Klutznick, 448 U.S. 448, 534 n. 5, 100 S.Ct. 2758, 2804 n. 5, 65 L.Ed.2d 902 (Stevens J. dissenting).

45. *See e.g.*, Bickel, *The Morality of Consent*, 133 (1975); Van Alstyne, *Rites of Passage: Race, the Supreme Court and the Constitution*, 46 U. Chicago Law Rev. 775 (1979).

46. *See United Steelworkers v. Weber*, 443 U.S. 193, 218-254, 99 S.Ct. 2721, 2734-2752, 61 L.Ed.2d 480 (Rehnquist, J., dissenting) (1979).

47. *See Fullilove v. Klutznick*, 448 U.S. 448, 522-527, 100 S.Ct. 2758, 2797-2800, 65 L.Ed.2d 902 (Stewart, J. dissenting) (1980).

48. *See Price v. Civil Service Commission*, 26 Cal.3d 257, 161 Cal.Rptr. 475, 604 P.2d 1365 (Mosk, J. dissenting) (1980).

49. *Local 35 v. City of Hartford*, 22 FEP Cases 1788, 1793-1796 (Van Graafiland, J. dissenting) (1980).

The absolute prohibition against government race legislation is bottomed on several sound premises. In this respect it must first be noted that those who are disadvantaged by racial legislation inevitably develop feelings of bitterness and animosity toward the preferred group. It is granted that Justice Blackmun has declared that

> "in order to get beyond racism we must first take race into account . . . and in order to treat some persons equally we must first treat them differently."[50]

But the conclusion is inescapable that Professor Grano is correct in remarking that "Orwell would have found grist for his mill"[51] in Justice Blackmun's statement. In fact, racial consciousness is dramatically—and perhaps permanently—increased by racial preferences.

It must further be noted that racial preferences often operate to reinforce stereotypes about minority groups. Members of the majority may well infer that minority job holders obtained their positions through favoritism rather than merit. Obviously, this is blatantly unfair to the minority person who would have won the position in a purely competitive job context.

Furthermore, minority preferences are particularly difficult to take when the disappointed white is a member of an ethnic group that has not been traditionally advantaged. White people—particularly whites of European descent—doubtless have many physical traits in common

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50. *See Regents of University of California v. Bakke*, 438 U.S. 265, 407, 98 S.Ct. 2733, 2807, 57 L.Ed.2d 750 (1978) (separate dissenting opinion of Justice Blackmun).

51. *See* Grano, Book Review, 26 Wayne Law Rev. 1395, 1402 n. 39 (1980).

and it would seem to be anthropologically correct to speak of "the white race." But historically—at least since the time of Tacitus—there has never been a nation solely representing the interests of white people or even European people. Instead, the various European nations and ethnic groups have been in conflict, and many of the American ethnic groups have unfortunate histories of persecution and discrimination.

Finally, it must be noted that there is room for real doubt about Judge Jone's statement that there is a national policy in favor of affirmative action.[52] There is a national policy of equal opportunity—but a national policy of racial preferences for minorities certainly is a different matter. Within the past few weeks the reconstructed United States Civil Rights Commission has issued an opinion[53] condemning racial quotas. While the Court readily acknowledges that it has its differences with the present Civil Rights Commission and Justice Department

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52. *See Bratton v. City of Detroit,* 704 F.2d 878, 886 (CA 6, 1983).

53. See the January 17, 1984 statement of the U.S. Commission on Civil Rights reprinted at 52 USLW 2417 (1984). This statement—ironically enough—uses the Detroit Police affirmative action plan upheld in *Bratton* as a model for an unfair and unlawful affirmative action plan. To quote the statement:

> "The U.S. Commission on Civil Rights deplores the city's use of a racial quota in its promotion of sergeants as one of the methods for achieving its laudible objectives."

It is interesting to note that the Commission's opinion was issued just a few days after the Supreme Court denied certiorari in *Bratton,* see — U.S. —, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984).

on many civil rights issues,[54] the Court believes that the recent affirmative action statement clearly signals a change in the country's policy on this issue. And the Court believes that the new policy probably represents the position of the majority of Americans.

With these considerations in mind, the Court believes that under a reasonable and logical interpretation of the term there is a "stigma" visited on Stuart Marsh as a result of the racial discrimination that he suffered in this case. In this case, however, the Court is not construing afresh the term "stigma." Instead, the Court's inquiry is much narrower. The Court must only decide whether Marsh has been stigmatized under the rather puzzling definition of stigma given in the *Bratton* opinion.

[8, 9] Under the *Bratton* definition of stigma, a white person is not stigmatized if the purpose of the affirmative action program is to aid blacks rather than to exclude whites.[55] This distinction, which has been advocated and elaborated upon in the scholarly writings of Professor Sedler,[56] cannot be particularly important to Mr. Marsh. Fur-

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54. This has been and will continue to be a very serious discussion. Nevertheless, attorneys and judges familiar with this Court might smile at the statement in the text. Those who are not so familiar with the Court might take a look at the Court's opinions in such cases as *Walker v. Johnson*, 544 F.Supp. 345 (E.D.Mich.1982); *Toins v. Ignash*, 534 F. Supp. 452 (E.D.Mich.1982); *Taylor v. Collins*, 574 F.Supp. 1554 (E.D.Mich.1983).

55. *See Bratton v. City of Detroit*, 704 F.2d 878, 890-892 (CA 6, 1983).

56. *See* Sedler, *Racial Preference, Reality and the Constitution; Bakke v. Regents of the University of California*, 17 Santa Clara Law Rev. 329 (1977); Sedler, *Racial Preference and the Constitution: The Societal Interest in the Equal Participation Objective*, 26 Wayne Law Rev. 1277 (1980).

thermore, it will be recalled that the purpose of Jim Crow laws was to preserve the cultural and biological "purity" of the white race rather than to penalize and stigmatize blacks. Nevertheless, having been told that a certain purpose can justify racial discrimination, the Court acknowledges that the exonerating purpose is present here. The purpose of the City's affirmative action plan is to uplift blacks. Therefore, *Bratton* compels the conclusion that plaintiff Marsh has not been stigmatized!

[10] Moving on to the second step of the *Bratton* test, the Court will now determine whether the particular affirmative action plan at issue is reasonable. In resolving this inquiry the Sixth Circuit suggested four relevant factors.[57] The four factors are: (1) whether the affirmative action plan is substantially related to the objective of rectifying past discrimination; (2) whether the use of racial classifications reflects the only legitimate method for achieving those objectives in light of the need for a remedy; (3) whether the affirmative action plan is temporary; (4) whether the plan unnecessarily trammels the interests of white candidates for promotion.

It should be noted that *Bratton* indicates that these four factors are not an always applicable guide for resolving the reasonableness inquiry.[58] Nevertheless, the four-factor guide is a very useful starting point. Thus, the Court will now apply the four-factor test.

First, it is easily concluded that the School Board's affirmative action program substantially relates to the

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57. *See Bratton v. City of Detroit*, 704 F.2d 878, 892 (CA 6, 1983).

58. *See id.*

objective of remedying past discrimination. The program basically assures that the racial composition of the counselor staff remains approximately equal to the racial composition of the entire secondary staff. This substantially relates to the goal of redressing the underrepresentation of black counselors.

Next, the Court must determine whether the affirmative action plan is the *only*[59] legitimate method of achieving the objective of rectifying the past underrepresentation Clearly, this inquiry is substantially the same as the "least intrusive means" test that proved to be the grim reaper of the Cal-Davis affirmative action plan struck down in Justice Powell's *Bakke* opinion.[60] As Professor Perry has pointed out, the least intrusive means test virtually assures that all equal protection clause suspect classifications will be struck down.[61] In light of this it is not surprising that Professor Sedler—a strong supporter of affirmative action—has cautioned against the use of this test in affirmative action judicial reviews.[62]

Nevertheless, one of the *Bratton* reasonableness factors is the "only means" test. And this Court, like so many other courts,[63] must conclude that the collective

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59. *See id.*

60. *See University of California Regents v. Bakke*, 438 U.S. 265, 311-317, 98 S.Ct. 2733, 2759-2762, 57 L.Ed.2d 750 (opinion of Justice Powell).

61. *See* Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 Columbia Law Rev. 1023, 1036 (1979).

62. *See* Sedler, *Racial Preference, Reality and the Constitution; Bakke v. Regents of the University of California*, 17 Santa Clara Law Rev. 329, 335 (1977).

63. *See id. See also* the reference to Professor Perry's article in n. 61.

bargaining agreement affirmative action program is not the only means to remedy the underrepresentation of black counselors. Article XIV-I-1(c) speaks of racial quotas. This Court believes that racial quotas are not the only way to solve the problems of black counselors' underrepresentation. Alternatives include, but are certainly not limited to Justice Powell's *Bakke* solution of permitting race to be but one factor in an applicant's file;[64] emphasis on recruiting prospective black counselors to the Flint area; and subsidies for educational programs designed to produce black counselors. Because there are alternatives available, this Court concludes that the "only means" prong of the *Bratton* reasonableness test has been violated.

Next, the Court considers whether the affirmative action plan at issue is "temporary." The temporariness test is, of course, a legacy of the Supreme Court's 1979

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64. *See University of California Regents v. Bakke*, 438 U.S. 265, 317, 98 S.Ct. 2733, 2762, 57 L.Ed.2d 750 (opinion of Justice Powell). To this day *Bakke* still is the law governing affirmative action college admission programs. Under this rule of law, race alone cannot be the basis of grants or denials of admission to colleges or professional schools.

In spite of *Bakke*, there are those who believe that the Universities are winking and nodding at the "race as one factor" rule and then carefully admitting a predetermined quota of minorities in exactly the same manner as the Cal-Davis affirmative action program that the Supreme Court struck down in *Bakke*.

The Court hopes this is not happening. The Tartuffe of the law would be the law school professor who lectures his students in the morning on the devious ways by which the Southern school districts avoided *Brown v. Board of Education* and then—later in the day—devises strategies for evading and frustrating the law of *Bakke*.

Title VII *Weber*[65] opinion—perhaps the most important opinion in the history of private sector employment discrimination law.

Weber involved a collectively bargained for affirmative action plan instituted at the Kaiser Aluminum Plant in Gramercy, Louisiana. Under the plan, half the places in an in-plant craft training program were reserved for black employees. The *Weber* majority—speaking through Justice Brennan—emphasized that the affirmative action was temporary because

> "preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craft worker in the Gramercy plant approximates the percentage of blacks in the local labor force."[66]

This statement—closely rivalling Justice Blackmun's *Bakke* aphorism for meaningless[67]—doesn't really apply to the Marsh case. Here, the Court is faced with an affirmative action provision that seems to perpetually keep the quota of black counselors above a specified rate.

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65. *See United Steelworkers v. Weber*, 443 U.S. 193, 208, 209, 99 S.Ct. 2721, 2730, 61 L.Ed.2d 480 (1979). For an incisive analysis of *Weber*, see Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. Chicago Law Rev. 425 (1980).

66. *See id.*

67. *See* n. 51 and accompanying text *supra*. The *Weber* temporariness statement is meaningless because it assumes that—without affirmative action—the Gramercy plant's statistics will remain at the right level. But what if the percentage of skilled black craftsmen dips below the percentage of blacks in the Gramercy labor force? Will affirmative action be reinstituted? If so, how can it be said that the Kaiser affirmative action program is temporary?

Therefore, at least for the life of the collective bargaining agreement, the Article XIV-I-1(c) cannot be said to be temporary.[68]

Finally, the Court considers whether the affirmative action plan unnecessarily trammels the interests of white would-be counselors. If every person in America had an inalienable right to pursue his occupational and professional interests to the utmost without fear of racial discrimination, this Court would hold that plaintiff Marsh's rights were indeed unnecessarily trammeled. Today, however, such a right does not exist for white males. Instead, the *Bratton* opinion dictates that white employees' interests are not unnecessarily trammeled where the challenged affirmative action plan leaves room for a reasonable number of white employees to be promoted or—in this case—to progress to the position of counselor.

The Court must conclude that—under the *Bratton* standard—white counselor applicants are not unnecessarily trammeled. The affirmative action plan requires that the percentage of black counselors approximate the percentage of black teachers in the secondary system. The formula results in a black counselor percentage of 34% (15 black counselors out of 44 counselors). Recalling that a 50% black promotion rate was upheld in *Bratton*, this Court must conclude that the numerical ratio in question does not unnecessarily trammel the interests of white employees.

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68. Plaintiff Marsh has challenged the Article XIV-I-1(c) affirmative action provision of the 1979-1982 collective bargaining agreement. It is interesting to note that the same provision has been established in Article XIV-I-1(c) of the 1982-1983 collective bargaining agreement.

Thus, on balance, the Court has determined that the affirmative action program is not the only method by which the underrepresentation problem can be solved and that the program is not temporary. On the other hand, the Court has determined that the program relates to its stated objective of combatting black underrepresentation. Furthermore, the Court has determined that the program does not unnecessarily trammel the interests of white employees as that phrase is used in *Bratton*.

In spite of the toss-up, the Court must conclude that the challenged program passes muster under the *Bratton* reasonableness test. The Court simply cannot—and will not—allow its profound and unrelenting personal doubts about the wisdom and constitutionality of race based employee promotion practices to dictate the disposition of this case. The affirmative action program before the Court does not touch nearly as many employees as the *Bratton* plan. Moreover, the promotion from teacher to counselor is not nearly as significant as the promotion from sergeant to lieutenant. These factors militate in support of the conclusion that the Board of Education black counselor affirmative action program is milder than the Detroit Police Department affirmative action program which the Sixth Circuit upheld in *Bratton*.

[11] The Court believes that this tips the balance in favor of upholding the constitutionality of the Board's affirmative action program. It is all too clear that the leeway given to affirmative action in the Sixth Circuit is wide enough to save the present affirmative action program from being held unconstitutional. Therefore, it is concluded that the reasonableness prong of the *Bratton* test has been satisfied and that the equal protection clause

has not been violated by the displacement of plaintiff Marsh. It follows, of course, that summary judgment must be granted with respect to plaintiff's sections 1981 and 1983 claims.

Having resolved the momentous equal protection clause issue that dominated the case, the Court cannot help but reflect a moment on the language of the clause. Even a cursory reading of the provision leaves the distinct impression that the equal protection clause language is far from susceptible to precise interpretation.

John Hart Ely has taken the position that open-ended constitutional provisions—like the equal protection clause—are an invitation to go beyond the document's four corners to formulate decisive constitutional principles.[69] Professor—now Dean—Ely would not resolve affirmative action the same way as the Court would if the Court were deciding the issue on a clean slate.[70] But the Court recognizes that Professor Ely is abundantly correct in his belief that it is impossible to decide affirmative action on the basis of the language of the equal protection clause. The route which this Court would take would be dictated by its belief that the basic principle lying at the very heart of the equal protection clause is a prohibition against governmental racial recognition.

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69. *See generally* Ely, *Democracy and Distrust*, chapter 2 (1980).

70. Ely would allow affirmative action because it does not discriminate against a politically defenseless group. *See* Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chicago Law Rev. 723 (1974). Professor Grano apparently would also allow affirmative action under this theory. *See* Grano, *Book Review*, 26 Wayne Law Rev. 1394, 1397-1406 (1980).

This is not to say that government should be forbidden from making vigorous efforts to rectify the residual effects of slavery and Jim Crow discrimination. Unlike some observers, this Court believes that there really is a distinction between goals and quotas. In adhering to the antidiscrimination statutory and constitutional mandates, governments should not be faulted for noting the difference between an employer's black labor force and the area's black population. This ratio can then be the point of departure for increased recruitment and educational programs. If this is what was meant by the term "affirmative action," then the Court would heartily approve.

But in the real world goals all too often merge into quotas, and overt racial preferences are put into effect. Affirmative action becomes reverse discrimination, and people are disadvantaged because of their race. And the Court deplores this.

But the Court is neither the Supreme Court nor the Sixth Circuit Court of Appeals. No, this is but a district court located within the Sixth Circuit, and it is a court that is absolutely bound to its good faith reading of Sixth Circuit and Supreme Court precedent.

Other judges sitting on the bench of the Eastern District of Michigan have recently decided affirmative action cases. The opinions in these cases—written by respected colleagues, Judge Joiner[71] and Judge Gilmore[72]—do not read like the present opinion.

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71. *See Wygant v. Jackson Board of Education,* 546 F.Supp. 1195 (ED Mich.1982).

72. *See Van Aken v. Young,* 541 F.Supp. 448 (ED Mich.1982)

Nevertheless, the Court felt obligated to write this particular opinion. Affirmative action is not the child of the judiciary. Racial preferences, for better or worse, are the result of years of pressure generated by the Labor Department and other departments of the executive branch of government.[73] But the judiciary has the responsibility to determine the constitutionality of affirmative action, and each judge must be guided by his own interpretation of the law and his own feelings about philosophy and history.[74]

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73. For an excellent discussion on this subject, see Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. Chicago Law Rev. 723 (1969). Another extremely worthwhile article is Silberman, *The Road to Racial Quotas*, Wall St. Journal, August 11, 1977 at 34, col. 4.

The Silberman article should be taken seriously by anyone who is interested in affirmative action. Silberman was employed for some time as a policy maker in the Office of Federal Contract Compliance Programs (OFCCP)—the arm of the Labor Department that monitors the government contract affirmative action program. Silberman discusses how the OFCCP did not originally seek to impose rigid racial preferences. Gradually, however, the OFCCP developed into the greatest wheelhorse of affirmative action in employment.

74. The Court must quickly point out what it means by this. In *deciding* cases—including constitutional cases—a federal judge should *not* be swayed by his personal philosophy and sense of history. To do so would reflect ignorance of the writings of Professors Grano and Ely. *See e.g.*, Grano, *Judicial Review and a Written Constitution*, 28 Wayne Law Review 1 (1981); Grano, Ely's Theory of Judicial Review: Preserving The Significance of the Political Process, 42 Ohio State Law Journal 167 (1981); Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

On the other hand, few people would deny that judges have an educative role. This is often—and properly—reflected in the style and dicta of judicial opinions. Although *Marsh*, *Wygant* and *Van Aken* reach the same result, the *Marsh* opinion obviously reads quite differently from the latter two opinions.

It is justice to inform the present plaintiff—Mr. Stuart Marsh—that this particular court was wracked by misgivings and doubts as it applied the constitutional analysis dictated by the higher courts. Unfortunately for Mr. Marsh—and perhaps for the United States—the practical result of this case is that Mr. Marsh will leave the federal courthouse without an ounce of relief.

The constitution, it is sad to say, did utterly nothing for Stuart Marsh. For this Court was bound by its constitutional oath of office to apply—rather than make—the law of the land. This compelled the Court to place its imprimatur on an explicit act of racial discrimination visited on an American citizen.

American history is a thunderous pronouncement that race consciousness must end. Racial preferences are morally wrong, and it is inevitable that the waters of anger and despair will rise up in the victims of affirmative action. The Court feels sadness and a sense of foreboding as it faces the grim truth that the American constitution has once again been interpreted to allow the government to engage in the rubric of racial entitlement.

III CONCLUSION AND ORDER

For the reason stated in the foregoing opinion, the Court hereby GRANTS defendants' motion for summary judgment on all claims asserted by plaintiff in this case. Therefore the Court ORDERS the Clerk to enter judgment for defendants forthwith.

IT IS SO ORDERED.

Supreme Court, U.S.
FILED
JUL 24 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1859

In The
Supreme Court of the United States
October Term, 1984

STUART MARSH,

Petitioner,

v

BOARD OF EDUCATION OF THE CITY OF FLINT, a Public Corporation; LEO MACKSOOD, individually and as President of the Board of Education of the City of Flint; UNITED TEACHERS OF FLINT, INC., a Michigan Corporation; HAROLD KEIM, individually and as President of United Teachers of Flint, Inc.; LANE HOTCHKISS individually and as Chief Negotiator and Grievance Officer of United Teachers of Flint, Inc.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

—AND APPENDIX—

THOMAS A. BAIRD
FOSTER, SWIFT, COLLINS & COEY, P.C.

Attorneys for Respondents United Teachers of Flint, Harold Keim, and Lane Hotchkiss

313 South Washington Square
Lansing, Michigan 48933
Telephone: (517) 372-8050

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTION PRESENTED

SHOULD CERTIORARI BE DENIED WHERE (1) THE LOWER COURTS CORRECTLY DECIDED THIS CASE, (2) THE DECISION BELOW DOES NOT RESULT IN A SPLIT OF AUTHORITY BETWEEN THE CIRCUITS, (3) THIS CASE IS POORLY POSTURED FOR REVIEW, (4) OTHER CASES NOW BEFORE THE COURT ARE MORE APPROPRIATE FOR REVIEW OF THE ISSUES PRESENTED, AND (5) THIS CASE IS MOOT?

Petitioner answers "Yes."

Respondents answer "No."

The lower courts did not answer this question.

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STATEMENT OF THE CASE

This Brief is filed on behalf of Respondents United Teachers of Flint, Inc., Harold Keim and Lane Hotchkiss.* Due to omissions and inaccuracies in Petitioner's Statement of the Case, the following is presented for the Court's consideration.

Petitioner's Statement inaccurately describes the voluntary affirmative action plan negotiated between Respondents Board of Education and United Teachers of Flint, ignores some of the predicates for the plant's implementation, exaggerates the effects of the plant's operation on Petitioner, and mischaracterizes the content of the decisions of the courts below.

The affirmative action provision in Respondents' collective bargaining agreement is not an illegal "quota" system, and does not utilize race as the sole criteria in determining assignments for counselors in the Flint School District. The criteria used in terms of assignment, layoff, and recall include state certification (including special counseling endorsement), other qualifications, seniority, and the individual needs of various schools in the School District, in addition to race. It is simply incorrect to assert that race was the only consideration used to decide that Petitioner should be transferred to a teaching position during the years in question.

Nor is it correct to say that the sole predicate for implementation of the parties' affirmative action plan was a "mere statistical disparity" of minorities employed by the

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* Respondents thank Ms. Mary L. Titsworth for her assistance on the Brief.

Flint School District. To the contrary, and as was clearly pointed out by the District Court, the Flint School District had underutilized minorities in teaching and related positions, and had assigned them to schools on the basis of their race, for years. (See pp. 5-6 below.)

Petitioner's rather melodramatic description of the effect of the provision on his employment situation is likewise overdrawn. Petitioner was not "demoted" at all (although this is the characterization used by the District Court). He was merely transferred from a counseling position to a classroom teaching position. Petitioner was not laid off. He was not assigned to a position of lower status. He lost no salary or fringe benefits. Nor did he lose "competitive seniority," whatever that is. Seniority for members of the bargaining unit represented by the United Teachers of Flint is district-wide, and is based on total service in the district, not just service as a counselor.

Finally, Petitioner mischaracterizes the decisions below. The District Court did not find that the predicate for Respondents' affirmative action plan was "mere statistical disparities" in the work force at the time of adoption of the plan. Rather this affirmative action provision grew out of a long course of underutilization of minorities in the work force and various attempts to remedy the situation. Nor did the District Court find that the affirmative action plan was not temporary in nature, as alleged by Petitioner. Rather the District Court found that the affirmative action plan would exist "for the life of the collective bargaining agreement . . ." (Petitioner's Appendix, p. 32A). What Petitioner fails to reveal is that the agreement was only effective for three years.

Completely omitted from the Petition is any discussion of the educational or psychological aspect of affirmative action in public education. This is probably due to two reasons. First, Petitioner would probably dispute that affirmative action in public education does have important educational and psychological ramifications for the children involved and so fails to mention the issue. More importantly however, there was no trial in this matter. Thus, no expert testimony, pro or con, was adduced.

Our fellow Respondents will provide further factual detail regarding the above. Suffice it to say that for the reasons set forth below, Stuart Marsh's Petition for Writ of Certiorari should be denied.

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SUMMARY OF REASONS FOR DENYING PETITION

Certiorari should be denied in this case for a number of reasons. First, the lower court reached the correct decision. The affirmative action plan in the present case meets the tests indicated by this Court in *University of California Board of Regents v. Bakke,* 438 U.S. 265 (1978), *United Steelworkers v. Weber,* 443 U.S. 193 (1979), and *Fullilove v. Klutznick,* 448 U.S. 448 (1980). The goal of eliminating past discrimination and underutilization of minorities, especially in public education, is valid and important, and the affirmative action plan at issue here is carefully tailored to achieve this goal.

Second, *certiorari* should be denied because the cases cited by the Petitioner do not indicate a split of authority on the issues presented. The holding in *Janowiak v. City of South Bend,* 750 F.2d 557 (7th Cir. 1984) does not con-

flict with the case at hand because the *Marsh* court did not rely solely on the statistical disparities present in *Janowiak. Fort Bend Independent School District v. City of Stafford,* 651 F.2d 1133 (5th Cir. 1981), and *Castaneda v. Pickard,* 648 F.2d 989 (5th Cir. 1981), are irrelevant because the facts and issues in those cases are completely different from those in *Marsh.*

Third, this case is not appropriate for review due to the inadequacy of the pleadings, affidavits and record. No trial was held. Additionally, the issue of employment discrimination in *Marsh* is complicated and intertwined with the issue of school desegregation.

Fourth, the case of *Wygant v. Jackson Board of Education,* 746 F.2d 1152 (6th Cir. 1984), *cert. granted,* 105 S. Ct. 2015 (1985), will provide the Supreme Court with more clearly delineated facts and the full record needed to decide such an important issue.

Finally, the present case should be dismissed as moot because an actual controversy no longer exists.

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REASONS FOR DENYING THE PETITION

I. The Lower Court Correctly Decided This Case.

The Court of Appeals correctly decided that the affirmative action plan involved in this case does not violate the Fourteenth Amendment to the Constitution. This Court has addressed the constitutionality of affirmative action plans in *Fullilove v. Klutznick,* 448 U.S. 448 (1980), and *University of California Regents v. Bakke,* 438 U.S. 265 (1978). In *United Steelworkers v. Weber,* 443 U.S. 193 (1979), the Court considered related statutory issues in the private sector. The Sixth Circuit has, from these

opinions, formulated a sound and logical approach to the issue of the constitutionality of voluntary affirmative action plans in the public sector.

It is clear, from this Court's opinions in *Fullilove, Bakke,* and *Weber,* that affirmative action plans are not illegal *per se.* Admittedly, this Court has not decided the precise standard of review under which affirmative action plans should be scrutinized. However, a majority of Justices expressed the view, in *Fullilove* and *Bakke,* that some governmental interest must be served by the program, and the program must somehow be directed toward the achievement of that objective.

The Sixth Circuit, in a line of cases dealing with affirmative action plans beginning with *Detroit Police Officers' Association v. Young,* 608 F.2d 671 (6th Cir. 1979) and ending with the case at hand, has adopted the same analysis, and applied it in this case. The decision here is in agreement with the opinions of the Supreme Court in holding that the goal of remedying past discrimination is a legitimate goal of this affirmative action plan, and that this plan is sufficiently tailored toward achievement of that goal to survive judicial scrutiny.

This Court has expressed the view that the purpose of remedying past discrimination is a valid governmental objective. *Fullilove v. Klutznick, supra.* The Sixth Circuit opinion in *Marsh* merely reflects this view. The District Court made ample findings of past employment disparities in the Flint School System to justify the plan. For example, the first black counselor was not hired until 1963. In addition, the court found minorities were substantially underrepresented in teaching and counseling positions in the Flint School System, and, when hired, were

usually assigned to schools with predominantly black student populations. Thus, the court found substantial underrepresentation of blacks as school counselors and a pattern of underutilization of minorites as teachers and counselors in the school district.

The Sixth Circuit also followed the guidance provided by this Court on the methods by which affirmative action may be implemented. In *Bakke,* Justices Brennan, White, Marshall and Blackmun indicated that the plan was substantially related to the stated goal of remedying past discrimination, in part because the plan did not stigmatize any discreet group or individual. In *Weber,* the court majority found that the affirmative action plan fell on the "permissible side of the line," 443 U.S. at 208, for several reasons. First, the plan was "designed to break down old patterns of racial segregation and hierarchy." *Id.* Second, the plan did not unnecessarily trammel the interests of the white employees. Third, the plan was temporary in nature.

The Sixth Circuit has exactly followed these guidelines from *Bakke* and *Weber* in the *Marsh* opinion. For example, the lower court found that the plan relates to the objective of remedying underrepresentation of blacks in a sensitive teaching position. The plan is also temporary—it lasts only until the end of the collective bargaining agreement. Finally, the plan does not stigmatize or "trammel" the interests of white employees. Marsh was merely transferred from one position to another. Thus, the means employed, the affirmative action plan, closely relate to the objective of remedying past discrimination, and do not un-

necessarily invade the legitimate interests of nonminority employees.*

II. The Cases Cited By Petitioner Do Not Indicate A Split Of Authority Between The Circuits On The Issues Presented.

First, the Petitioner charges *Marsh* conflicts with the holding in *Janowiak v. City of South Bend*, 750 F.2d 557 (7th Cir. 1984) that evidence of statistical disparity alone fails to prove past discrimination and cannot justify the adoption of an affirmative action plan. There is no conflict between *Marsh* and *Janowiak*, however, because the *Marsh* court did not rely solely on statistical disparities between the percentages of blacks employed and the percentage of blacks in the community.

The *Marsh* court also relied on other evidence to show a legitimate predicate for affirmative action. For example, the court found that in 1959 there were only 12 black teachers in the district's junior high schools and 4 in the district's high schools. Additionally, the court found as blacks were hired into the system, they were usually assigned to schools with predominantly black student bodies. Relating to guidance counselors, the court found the first black counselor was not hired until 1963. *Marsh v. Board of Education of the City of Flint*, 581 F. Supp. 614, 621-622 (E.D. Mich. 1984). (Petitioner's Appendix, App. 20a-21a.) Thus, the lower court did not merely discuss the statistical disparity between the percentage of minorities employed and the percentage of minorities in the community as the

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*In his argument, Petitioner finds fault with the lower courts' use of various statistical comparisons. Brief for Petitioner at 9. The Petitioner did not raise this issue below, it was waived, and the argument will not be addressed in this Brief.

lower court did in *Janowiak*. There is no conflict between the Sixth Circuit opinion in *Marsh* and the Seventh Circuit opinion in *Janowiak*.

The Petitioner's reliance on *Fort Bend Independent School District v. City of Stafford*, 651 F.2d 1133 (5th Cir. 1981), and *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981) is equally unfounded. The Petitioner states that these Fifth Circuit cases reject the method of statistical comparison between student and faculty populations to identify discrimination in teacher employment. However, the facts and issues involved in both of those cases are so clearly different from those in the present case as to render the former irrelevant. These were school desegregation cases, and involved court ordered affirmative action, not a voluntary plan.

The reliance of the Petitioner on the *Janowiak, Fort Bend* and *Castaneda* opinions to show a conflict in circuits on this issue is completely unfounded. The cases cited by the Petitioner do not indicate a split of authority between the circuits on the issues presented.

III. This Case Is Not Well Suited For Review By The Supreme Court.

In addition to the fact that the Court of Appeals reached the correct result and that no conflict between the circuits exists, the *Marsh* case is otherwise inappropriate for review. In the District Court, this case was simply not handled with the care and attention which the issues deserve. There has been no trial on the merits of this case. No expert testimony regarding the educational and psychological importance of affirmative action in employment in public education was possible. The District Court de-

cided the case on Respondents' motions for summary judgment after a brief hearing. *Certiorari* should be denied due to the lack of a sufficient record and evidence to decide the case on its merits, and because this Court, even if it rules in Petitioner's favor, would merely be required to remand for trial anyway.

IV. Other Cases Presently Before This Court Are More Suitable For Review Of The Issues Raised In This Matter.

A more sufficient record and more clearly delineated facts are provided by *Wygant v. Jackson Board of Education,* 746 F.2d 1152 (6th Cir. 1984), *cert. granted,* 105 S. Ct. 2015 (1985), a case scheduled for review by this Court this term. Although *Wygant* and *Marsh* raise the same general legal issue left open by this Court in *United Steelworkers v. Weber*—the validity under the Fourteenth Amendment of a voluntary affirmative action plan in public sector employment—*Wygant* is a much more appropriate case for review for several reasons.

First, the facts in *Wygant* are more amenable to deciding the important legal issue presented. In *Wygant,* teachers were actually laid off pursuant to the affirmative action plan and the collective bargaining agreement. In *Marsh,* the Petitioner was merely transferred. He has, in fact, suffered no real damages at all.

In addition, the issue of the validity of the affirmative action plan in *Wygant* remains uncomplicated by the fact that the Jackson Public Schools have not been involved in prior, formal desegregation proceedings. The issue of the validity of the affirmative action plan in *Marsh* is intertwined with the history of school desegregation in the Flint School District. Thus, *Wygant* is a more appro-

priate case for review on this issue due to the more clearly identifiable impact on employees caused by layoffs, the lack of complication of the issues, and the more fully developed record in *Wygant*.

V. This Case Is Moot.

Finally, *certiorari* should be denied in this case because the case is moot. Petitioner brought this action only on behalf of himself. Class litigation was not involved. During the course of litigation, Marsh was reinstated in his position as a counselor. (Affidavit of Stuart Boze, App. 3.)

It is highly improbable that Petitioner will be assigned to a classroom teaching position for the remainder of his teaching career. (App. 4.) Thus, the relief he sought has been attained, and there is no reasonable expectation that the wrong he alleges will be repeated in the future.

The requirement that an actual controversy must exist at all stages of appellate review has thus been violated. *Roe v. Wade*, 410 U.S. 113 (1973). When a case becomes moot while pending review, it should be dismissed. *Certiorari* should therefore be denied. *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

———o———

CONCLUSION

For these reasons it is respectfully requested that this Honorable Court deny Stuart Marsh's Petition for a Writ of Certiorari.

Respectfully submitted,

FOSTER, SWIFT, COLLINS & COEY, P.C.
Attorneys for Respondent
By: /s/ Thomas A. Baird (P 29050)
313 South Washington Square
Lansing, MI 48933
Telephone: (517) 372-8050

Dated: July 23, 1985

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Sixth Circuit Court of Appeals
Case No. 84-1240

U.S. District Court Case
No. 80 40349 (ED Mich)

STUART MARSH,

Plaintiff-Appellant,

-vs-

BOARD OF EDUCATION OF CITY OF FLINT, et al,

Defendants-Appellees.

Clint Bolick
K. Preston Oade, Jr.
Maxwell A. Miller
Attorneys for Plaintiff-Appellant

C. Rees Dean (P12584)
Attorney for Defendants-Appellees
Board and Leo Macksood

Thomas A. Baird (P29050)
Attorney for Defendants-Appellees
United Teachers, Harold Keim and
Lane Hotchkiss

_____/

AFFIDAVIT IN SUPPORT OF
DEFENDANTS-APPELLEE'S
(BOARD OF EDUCATION)
MOTION TO DISMISS

STATE OF MICHIGAN)
) ss:
COUNTY OF GENESSE)

STUART A. BOZE, being first duly sworn, says:

1. He is the Executive Director, Personnel Services for Defendant-Appellee Board of Education of the School District of the City of Flint (Board).

2. He has knowledge of the facts herein and, if sworn, can testify competently with regard thereto.

3. Stuart A. Marsh is a teacher in the School District of the City of Flint (District). He has been employed by the Board continuously since September 7, 1965. He has accrued seniority in the teacher bargaining unit since the date of his employment.[1] Since September, 1967, Mr. Marsh's employment has been governed by individual contracts and by collective bargaining agreements between the Board and Defendant-Appellee, United Teachers of Flint (UTF), the collective bargaining agent for Flint teachers.

4. On September 7, 1965 Mr. Marsh was assigned to Northwestern High School as a teacher of English. He continued to teach English, Homeroom or Foreign Relations until September, 1970.

5. In September, 1970 Mr. Marsh was assigned to a student counselor position. Student counselors are employed only in the secondary schools. He continued as a student counselor until the beginning of the 1980-81 academic school year.

6. In September, 1980 the Board reduced the number of student counselors from 52 to 48. Acting under affirma-

---

[1] Seniority is systemwide seniority. Seniority accrues from the date of employment. Seniority does not accrue during unpaid leaves of absence. Mr. Marsh is charged with no unpaid leaves of absence. Therefore his seniority has accrued from the date of his employment.

tive action provisions of Article XIV of the collective bargaining agreement entitled "Vacancies, Transfers and Reduction in Staff" the Board transferred Mr. Marsh to a teaching position (English) at a secondary school.

7. The pertinent paragraphs of Article XIV are paragraphs F, G, H and I. The full text of these paragraphs is attached. Paragraph I permits the Board to ignore systemwide seniority in determining which counselors shall be laid off or transferred and consider only the District's over all instructional needs, teacher certification and qualifications and affirmative action goals.

The goal was a counseling staff including a percentage of minorities that exceeded by 5% the percentage of minority teachers to the total teaching staff (including counselors) in the secondary level teacher labor pool in existence at the time of layoff.

Affirmative action provisions did not, however, apply to filling of vacancies on the counseling staff. In the event of a vacancy or an increase in the number of counselor positions, laid off or transferred counselors are guaranteed the right to return to counseling on the basis of seniority (last out first back) for a period of three years.

8. In the 1981-82 school year Mr. Marsh exercised his seniority rights to claim a counselor's position.

9. In the 1982-83 academic year he was again transferred to a teaching position. He remained in a teaching position during the 1983-84 academic school year.

10. Two counselors retired at the close of the 1983-84 academic school year, and on August 27, 1984 at the opening of the 1984-85 school year Mr. Marsh was reassigned to a counseling position.

11. The number of counselors employed by the School District is dictated by accreditation requirements of the North Central Accrediting Agency. A counselor may be assigned no more than 350 students.

12. The Board will employ 43 counselors in the 1984-85 academic school year. Affirmative action goals have been met. Each counselor's complement of students is at or near the allowed maximum (350).

13. Of the 43 counselors, the counselor having the most credited systemwide seniority was employed September 7, 1954, and the counselor having the least credited systemwide seniority was employed September 18, 1967. No persons, other than those already on the Board's payroll, have been employed as counselors since September 18, 1967. Her credited seniority dates from February 3, 1971.

13. Of the white counselors employed in the District in the 1984-85 school year, Mr. Marsh has the least credited seniority. Seven black counselors have less credited seniority than Mr. Marsh.

Given the age of the counseling staff[2] and thus the potential for a greater number of vacancies in the next few years; the fact that each counselor's student load is at or near the allowable maximum; and the increased number of students at the secondary level resulting from the addition of the ninth grade to the District's high schools accompanied by the adoption of a middle school plan, it is highly improbable that Mr. Marsh will be reassigned to a classroom teaching position during the remainder of his teaching career.

---

[2] Three counselors are 63 years of age; four are between 60 and 63; seven are between 55 and 60.

The current collective bargaining agreement expires August 31, 1985. Whether the provisions of Article XIV challenged by Mr. Marsh in this action will be included in the next collective bargaining agreement has not yet been determined.

/s/ Stuart A. Boze

Subscribed and sworn to before me this
29th day of August, 1984.

/s/ Duane Johnson
Notary Public, Genesee County, Michigan
My Commission expires: 1-5-87

BELLAIRS DEAN COOLEY SILER & MOULTON
352 S. Saginaw St., Suite 510
Flint, MI 48502 (313) 767-1520

ARTICLE XIV

Vacancies, Transfers, and Reduction in Staff

A. Although the Board and the UTF recognize that frequent transfers of teachers from one school to another is disruptive of the educational process, they also recognize that some transfers will be necessary.

B. Transfers and changes of assignment shall be on a voluntary basis whenever possible.

C. When involuntary assignments or transfers are made, teachers will be given fifteen (15) days notice of said transfers, and the reasons therefor in writing, except that in those cases in which a transfer must be made in less than fifteen (15) days, the aforementioned written notice will be given as time will allow. All involuntary transfers will be given an opportunity to state in writing the reasons for their objection to the transfer.

D. Teachers shall be given an opportunity to apply, without giving reasons, for transfers to be effective the next school year if their application is made by April 30; provided, that if the application is made after April 30, the teacher shall state the reasons for the transfer request or if the request is for transfer to a particular school, the teacher shall be obligated to state the specific reasons for the choice of the school. A list of vacancies within the bargaining unit shall be posted on a conspicuous bulletin board in the Office of Personnel Services and a copy shall be mailed to the UTF by the 15th day of each month. If a teacher requests a transfer under this Paragraph and is refused, he/she shall be notified in writing of the reasons therefor if he/she so requests. No teacher shall be discriminated against because of a request to transfer.

E. When a reduction in the number of teachers in a school is required during the academic year as determined in Appendices D-1, D-2, or D-3, the administration shall notify all teachers in the affected school(s) in elementary, and affected department(s) in secondary of the reduction and shall provide an opportunity for the reduction to be made through volunteers. If a teacher volunteers and is so designated for an involuntary transfer through application of the criteria provided in Provision F for the reduction, said teacher(s) shall be considered as involuntary transfer(s) for purposes of Provision G.

After the academic year is completed, a teacher designated for involuntary transfer and subsequently assigned, may allow and/or recruit another teacher from his or her former building to volunteer to take his or her place, provided there is no violation of Sections F and G herein and upon concurrence of the "receiving" and "sending" building principals and the Office of Personnel Services. Upon agreement being reached by the aforementioned parties, the teacher replacing the previously assigned involuntarily transferred teacher will be considered to be involuntarily transferred under Provision G-1, for purposes of said placement.

F. Should involuntary transfers be found to be necessary, the selection of such teachers to be involuntarily transferred shall be determined on the basis of the following criteria:

1. District overall instructional needs;
2. Teacher certification and qualifications;
3. Affirmative action goals;
4. Extracurricular needs;
5. uninterrupted systemwide seniority (service in the Flint School District);

6. Other necessary and reasonable considerations, determined by the Board after consultation with the UTF.

G. Teachers employed by the Board (except temporary and substitute teachers) will be given consideration as follows in filling any vacant position in the bargaining unit:

1. Whenever any position in the bargaining unit shall become vacant, the Board shall give first consideration to involuntarily transferred teachers in the filling of that vacancy. If the Board determines that the needs of the district will not be met by filling the position in this manner, the Board shall then consider requests from teachers who are not on layoffs or leave for transfer unless the vacancy is the result of previous transfer.

2. Vacancies not filled in the aforementioned manner shall be filled from among those teachers who are on leave, have not been laid off and whose leaves have expired.

3. Should vacancies not be filled in provisions 1 and 2 above, said vacancies shall be filled from among those teachers who have been laid off including teachers on leave who have been laid off in accordance with the provision of Article XIV-I-2.

The Board's decision with regard to which teacher shall fill such vacant position shall be final, provided that the criteria set forth in paragraph F shall not be applied arbitrarily nor capriciously, and provided further that the Board's right to make a final determination with regard to this paragraph does not diminish the Board's responsibilities with regard to the remaining paragraphs of this article.

H. The Board shall prepare and present to the UTF a seniority list for the 1982-83, 1983-84, and 1984-85 school years. Any teacher or the UTF may challenge the accuracy of the seniority list or the update, provided if the seniority date is not challenged within sixty (60) days after its issuance it will be considered as correct for that respective year or until such time as a revised seniority list is issued.

The seniority list shall include the following:

1. Full name of teacher.
2. Years of uninterrupted service in the Flint School District.
3. Tenure status as of the printing of the seniority list.
4. Certification.
5. Major(s) and Minor(s).

I. *Reduction in Staff*

If the Board shall determine to reduce staff, the following procedures shall be controlling:

1. *Layoff*

a. The Board shall determine the subject areas in secondary schools and the number of positions in elementary schools in which reductions will be made and the number of positions affected and will notify the UTF of such determinations.

b. Nontenure teachers shall be laid off first followed by tenure teachers.

c. The order of layoff of nontenure teachers shall be determined by the Board. In secondary schools, the order of layoff of tenure teachers in each affected subject area shall be based upon the length of uninterrupted service in the Flint School District i.e., the longest uninter-

rupted service in the District shall be the last in his/her subject area to be laid off.

In elementary schools, the order of layoff of tenure teachers shall be based upon the length of uninterrupted service in the Flint School District regardless of the grade level to which the teacher may be assigned at the time of layoff.

Where length of service is the same, the tenure teacher in the secondary schools with the highest qualifications in his/her subject area will be retained. Where length of service is the same, the tenure teacher in elementary schools with the highest qualifications will be retained regardless of the grade level to which he/she is assigned. Where length of service and qualifications are the same, the teacher in the secondary schools with the best performance record in his/her subject area and the tenure teacher in the elementary schools with the best performance record regardless of the grade level to which he/she is assigned will be retained.

If layoffs are to occur, a seniority list in accordance with this paragraph shall be prepared by the Board and a copy thereof be given to the UTF.

It is understood that should the Board determine to reduce staff among positions requiring more than a work year of thirty-nine (39) weeks as determined by the teacher's individual contract of employment (e.g., academic counselors, librarians) said reduction will be made in accord with the provisions of Article XVI, F-1; -2; -3 (herein defined for 40 week employees for purposes of lay-off from 40 week employment to 39 week employment as a plus five percent from the ratio of minority teachers to majority teachers in the second-

ary level teacher labor pool in existence at the time of lay-off; -5 and Provision G, subject to the following limitations:

A teacher assigned to one of the aforesaid positions and who is laid off from a 40-week position and transferred into a 39-week position under Provisions F and G of this Article shall be granted an extra week's work in some appropriate capacity for one (1) year subsequent to the layoff.

The above provision will not be used to circumvent seniority (e.g., laying off a more senior minority counselor to retain a less senior minority counselor).

Additionally, if the area reduced is restaffed (moving toward the number the area was at before the decrease) district wide, the teacher(s) transferred out shall be guaranteed return to the area on the basis of seniority (last out, first back) for a period of three years.

Office-Supreme Court, U.S.
FILED
JUL 26 1985
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-1859

In The

Supreme Court of the United States

October Term, 1984

STUART MARSH,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF FLINT, a Public Corporation; LEO MACKSOOD, individually and as President of the Board of Education of the City of Flint; UNITED TEACHERS OF FLINT, INC., a Michigan Corporation; HAROLD KEIM, individually and as President of United Teachers of Flint, Inc.; LANE HOTCHKISS, individually and as Chief Negotiator and Grievance Officer of United Teachers of Flint, Inc.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

—AND APPENDIX—

C. Rees Dean
Bellairs, Dean, Cooley, Siler & Moulton
Attorneys for Respondents, Board of Education of the City of Flint and Leo Macksood
352 S. Saginaw St., Suite 510
Flint, MI 48502
Telephone: (313) 767-1520

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTION PRESENTED

DID THE TRANSFER OF PETITIONER FROM A COUNSELING POSITION TO A CLASSROOM TEACHING POSITION WITHOUT LOSS OF PAY, BENEFITS AND SENIORITY, PURSUANT TO AFFIRMATIVE ACTION PROVISIONS OF A COLLECTIVE BARGAINING AGREEMENT BETWEEN THE BOARD OF EDUCATION OF A PUBLIC SCHOOL SYSTEM AND THE TEACHER'S UNION, DEPRIVE PETITIONER OF EQUAL PROTECTION OF THE LAWS?

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STATEMENT OF THE CASE

A. Preliminary Matters

Respondent, Board of Education of the City of Flint, is hereinafter "Board". The School District of the City of Flint is hereinafter "District".

Respondent, United Teachers of Flint (hereinafter UTF) is the collective bargaining agent for teachers employed by the Board. Petitioner, both as counselor and classroom teacher, is a member of the bargaining unit represented by the UTF.

"Teachers" is used in the collective bargaining agreement in the generic sense to describe all members of the unit,—classroom teachers, counselors and etc.

"Counselors", under Michigan law, must hold valid Michigan teaching certificates with counseling endorsements.

"Seniority" is accrued by all members of the UTF bargaining unit on a system-wide basis.

Contrary to statements on page 4 of the Petition, there were no "factual stipulations" in the District Court. The facts before the District Court when it issued its "Memorandum Opinion and Order" granting Respondents' motions for summary judgment were those recited in the Board's affidavit and Petitioner's affidavit in opposition to the motions for summary judgment. The Board's affidavit is included in the Appendix at pages 1a-14a. The

exhibits referred to in the Board's affidavit are not included because of their bulk.[1] The Petitioner's Affidavit is included in the Appendix at pages 16a-20a.

B. Background and Facts

The full text of the affirmative action provisions of the collective bargaining agreements that allegedly offend the Equal Protection Clause are printed in the Appendix at pages 10a, 11a.

Reduced to their essence, the challenged provisions permit the Board to ignore system-wide seniority in determining which counselors shall be laid off. The goal is a counseling staff including a percentage of minorities that exceed by 5% the ratio of minority teachers to the total teaching staff (including counselors) in the secondary school teacher labor pool in existence at the time of their layoff.

---

1. Exhibit 7 is a 117 page Decision of the Administrative Law Judge issued in the Matter of Flint Community Schools Michigan and Michigan State Department of Education, Respondents (HEW Docket No. S-115) in which is recited a litany of the District's past discriminatory practices and the vestiges remaining which the ALJ used to justify termination of federal funding to the District. HEW referred the matter to the Justice Department. The Justice Department commenced action against the District in the United States District Court, Eastern District of Michigan charging violations of Title VI of the Civil Rights Act of 1964. The action was settled by Consent Judgment, without prejudice. The District still operates under the Consent Judgment entered by the Honorable Stewart A. Newblatt in the United States District Court for the Eastern District of Michigan, Southern Division—Flint (Docket No. 80-40075). (App. 12a)

The affirmative action provisions do not, however, apply to the filling of vacancies on the counseling staff. If there are vacancies or an increase in the number of counselor positions, laid off or transferred counselors are guaranteed the right to return to counseling on the basis of system-wide seniority (last out first back) for a period of three years.

The goal of the contractual affirmative action plan was and is to maintain a counseling staff having a sufficient number of black counselors to permit assignment of one black counselor to each of the District's 13 secondary schools.[2] (App. 9a, 13a) The rationale for assignment of one black counselor to each secondary school is discussed below.

By operation of the contractual affirmative action plan, Stuart Marsh was transferred from his counseling position to a classroom teaching position in the 1980-81 school year. Classroom teachers receive the same pay and benefits as counselors. Counselors and teachers accrue seniority on a system-wide basis.

In the 1981-82 school year Petitioner exercised his seniority to claim a counseling position. In the 1983-84 school year, again by operation of the contractual affirmative action provisions, he was transferred to a teaching position. He continued teaching during the 1983-84 school year.

He again claimed a vacant counseling position at the beginning of the 1984-85 school year. He continues as a counselor. It is highly unlikely Stuart Marsh will ever

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2. Counselors are assigned only to secondary schools.

again be transferred to a classroom teaching position. (Affidavit of Stuart Boze—App. 21a-25a)

———o———

REASONS FOR DENYING PETITION

The Contractual Affirmative Action Plan Is A Constitutionally Permissible Plan To Provide Necessary Educational Services

A. The Educational Purpose

The boundaries of the City of Flint, Michigan and the boundaries of the District are the same, with immaterial exceptions. The City is a General Motors Corporation plant city. The economic health of the City and the District fluctuates with the rise and fall of automobile production. The population of the City, and thus the student population of the District, have declined steadily for more than a decade because of white flight, highway construction, the automobile industry recession, automation and other urban ills. The minority population has become the majority. More than 60% of the District's students are black. Black students are enrolled in all of the District's 13 secondary schools. Several secondary schools are more than 90% black.

Because of declining enrollments, the teaching staff was reduced over a period of years. It became apparent to both the UTF and the Board, prior to the opening of negotiations for a new collective bargaining agreement in 1979, that further and deeper cuts would have to be made because of depressed conditions in the automobile industry. Because black counselors were the last hired,

they would be the first to go, making it impossible to provide one black counselor in some of the secondary schools.

Counselors in the Flint School System are not just academic advisors. They deal with a variety of the students' personal problems;—poverty, broken homes in which addiction, student pregnancies to name a few. To suggest that a black counselor is no more than a role model for black students is to ignore the realities in life in this predominantly black, urban, industrial city school district where high unemployment is sometimes the rule rather than the exception.

There are times when black students require the counseling of someone who can understand and help them deal with their special problems. Insuring that a black counselor is available serves a valid educational purpose.

B. HEW Administrative Proceedings

On March 22, 1976, HEW commenced compliance proceedings for the termination of federal financial assistance to the District charging the District denied black students equal educational services and opportunities in violation of Title VI of the Civil Rights Act of 1964. On October 6, 1977, following a lengthy hearing, the Administrative Law Judge assigned to conduct the proceedings issued his Decision in which he found the District guilty:

> "a. Respondent Flint historically engaged in conduct, continued after 1964 and continues at present to engage in conduct and vestiges of Respondent's pre-1964 conduct continued after 1964 and continues at present, to segregate black students into certain schools and maintain other schools as white in enrollment as long as possible, which may be more fully described as follows:
>
> (1) neighborhood school policies;
>
> (2) school site selection;

(3) changes in school attendance zone boundaries; and

(4) adjustment of school assignments inconsistent with school capacities.

b. Respondent Flint historically operated, continued after 1964 and continues to operate a school system identified by substantial segregation of race and color of students assigned.

c. Respondent Flint historically assigned, and continued after 1964 until January, 1977, to assign Black teachers and supervisors to schools which were identified by predominant enrollment of Black students.

d. Respondent Flint historically operated, continued after 1964 until 1977 to operate a school system identified by substantial segregation by race and color of teachers and supervisors assigned." (App. 6a, 7a)

The Administrative Law Judge established a plan which he said would bring the District into compliance with the requirements of Title VI and ordered their implementation.

"Although Respondent Flint achieved compliance with *Singleton* in 1977, the compliance is concluded to be as a result of this case. Accordingly, desegregation should require a commitment from Respondent Flint to maintain compliance with *Singleton* in the future.

Discrimination in employment of teachers has not been established. No remedy, thus, can be required on this allegation. As noted, since 1960 Respondent Flint appears to have engaged in an effective affirmative action plan in the employment of Black teachers. For the same reason, no remedy can be required for the alleged discrimination in promotions of blacks to supervisory teachers since 1964, and for the alleged discrimination in assignment of lower qualified teachers to predominantly Black schools." (App. 7a, 8a)

Both parties filed exceptions. No action was taken on the exceptions before the Justice Department commenced suit in the United States District Court for the Eastern District of Michigan which resulted in the Consent Judgment mentioned in footnote 1.

It does not matter that the Board of Education disagrees with the findings and conclusions of the Administrative Law Judge and that settlement of the long-standing dispute with OCR-HEW was reached without admissions of guilt. The findings were made by an Administrative Law Judge pursuant to the authority vested in him. The Board is not limited to the remedies prescribed by the Administrative Law Judge, or those in the Consent Judgment approved by the District Board, in its efforts to correct the intentional discrimination found.

C. The Contractual Affirmative Action Plan Was The Least Burdensome Plan That Could Have Been Adopted

Stuart Marsh lost no pay, benefits or seniority as a result of the implementation of the Plan. He declares he lost status when he was returned to the ranks of classroom teachers.

It is Stuart Marsh's perception that there are TEACHERS and there are teachers;—that counseling is a higher estate in the Order of Educators than classroom teaching. Thus, he declares, his transfer to teaching was, in fact, "a demotion". Moreover, Petitioner says, "Because Marsh is the wrong color, he has twice been forced to assume rigorous new duties at the twilight of his career . . ." (See Petition, note 2, p. 5)

No evidence was offered in the District Court to support these assertions. In fact, in his affidavit to the Dis-

trict Court in opposition to the motions for summary judgment, Marsh characterizes his change of duties as a "transfer." (App. 17a) The words "demoted", "demotion" and the like were used only in his briefs and oral arguments by his counsel to the Court. The District Court adopted and incorporated in its opinion Petitioner's unproven assertion that he had been "demoted".

Counselors are teachers with additional training in counseling. The Michigan Tenure of Teachers Act does not distinguish between teachers with different specialties. Special education teachers obtain tenure as "teachers", not as special education teachers. Counselors obtain tenure as "teachers", not as counselors. *MCL 38.71; MSA 15.1971 et seq.* The word "demote" is defined by the Tenure Act to mean "to reduce compensation or to transfer to a position carrying a lower salary." *MCL 38.74; MSA 15.1974.*

Stuart Marsh was deprived of nothing to which he was entitled. Stuart Marsh is a tenured teacher. He is not a tenured counselor. He was not deprived of a Constitutionally protected property interest when he was transferred to a classroom teaching position, and he makes no such claim.

No less burdensome plan than the contractual affirmative action plan agreed upon and implemented by the Board and the UTF could have been devised to insure that at least one black counselor was available to students in each secondary school of the District. Petitioner has suggested none.

II. The Marsh Case Is Not The Case To Test The Sixth Circuit's Decision in Bratton

Petitioner's counsel has seized on the Marsh case to test the validity of the two-tier test for determining whether a public employer's affirmative action plan passes Constitutional muster enunciated by the Sixth Circuit Court in *Bratton v City of Detroit,* 704 F2d 878 (6th Cir 1983) as modified on denial of reh'g en banc, 712 F2d 222 (6th Cir 1983), cert denied, 104 S Ct 703 (1984).

There is no need to apply *Bration* tests to determine the Constitutional validity of the contractual affirmative action plan implemented by the Board and the UTF.

The plan serves a valid educational purpose. The plan is an appropriate and Constitutional remedy for the intentional discrimination found by the Administrative Law Judge. Except for damage to Marsh's ego and his perception of his status among teachers, the only injury he has suffered is his overstated claims he was overworked as a classroom teacher. The Equal Protection Clause does not protect Mr. Marsh from injury to his ego, protect his perception of his place in society and among his fellow teachers, and, most certainly, the Equal Protection Clause does not grant immunity from hard work.

The Board/UTF contracual affirmative action plan is Constitutional with or without *Bratton's* tests.

———o———

CONCLUSION

For the reasons stated, and for the reasons stated in the UTF respondents' Brief in Opposition, with which the Board respondents concur, the Board respectfully requests the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

/s/ C. Rees Dean P12584
Attorney for Respondents, Board of Education and Leo Macksood
352 S. Saginaw St., Suite 510
Flint, MI 48502
Telephone: (313) 767-1520

Dated: July 25, 1985

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION — FLINT

Case No. 80-40349

STUART MARSH,

Plaintiff,

v.

BOARD OF EDUCATION OF CITY OF FLINT, et al,

Defendants.

---/

BRUCE A. NEWMAN, P.C., (P18268)
RICHARD J. DREW (P23729)
Attorneys for Plaintiff

---/

THOMAS A. BAIRD (P29050)
Attorney for United Teachers of Flint

---/

C. REES DEAN (P12584)
Attorney for Defendants, Board of Education and Macksood

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AFFIDAVIT IN SUPPORT OF DEFENDANTS' (BOARD OF EDUCATION AND MACKSOOD) MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

At the Interim Pre-Trial Conference held January 5, 1983 the Court remarked that it is the Court's opinion that an affirmative action plan which establishes goals for the employment and assignment of minority teachers is

unconstitutional unless the plan is adopted and the goal established to remedy present or past discrimination against minorities.

The Court then stated that while the Court might infer impermissible discrimination against minorities in their employment and assignment to teaching positions in the School District from the data furnished by the Board in support of its motion, the Court did not believe the data were sufficient to warrant the dismissal of this action on motion.

The Court then ordered the parties to submit to the Court supplemental affidavits and briefs in support of or in opposition to the Board's Motion for Summary Judgment. Although the Board does not agree with the propositions stated by the Court, the Board nevertheless submits the affidavit contained herein in pursuance of the Court's order.

To adequately establish the basis for the Board's Motion, it is necessary to review history, to consider U.S. Department of Health, Education and Welfare charges that the Flint School District violated Title VI of the Civil Rights Act of 1964 — 42 USC 2000d et seq, the deferral of federal funds pending a hearing on the charges, the findings and decision of the Administrative Law Judge, the termination of federal funds and the disposition of the charges both by voluntary action on the part of the Board and as a result of settlement with the U.S. Department of Justice.

Thirteen years elapsed between the onset of HEW's investigation of the District on charges of Title VI violations and the ultimate settlement (if one can ever call

such matters settled) of the various issues with the Justice Department in 1981. The charges against the District were multiple, including charges of intentionally discriminatory employment practices, denial of equal educational opportunities and segregation of the student bodies and teaching staff of the schools of the District all based upon race. Given the period covered by HEW's investigation (the mid-30's to 1977 and thereafter until settlement with the Justice Department in 1981) and the breadth of the charges, it is difficult to recite the information contemplated by the Court's order of January 7, 1983 in a single affidavit, and confusing to submit (it) in multiple affidavits signed by the persons having knowledge of the various aspects of this longstanding problem of the Flint School District. Therefore, the following affidavit is divided into sections to provide some continuity with each affiant swearing to the truth of the factual statements of which he has knowledge.

AFFIDAVIT

A.

OCB-HEW Charges

1. In 1968-1970 the Office for Civil Rights, Department of Health, Education and Welfare (OCR-HEW) conducted an investigation of the Flint School District to determine if the District operated its federally funded programs in a discriminatory manner in violation of Title VI-*42 USC 2000d.*

2. On August 29, 1975 Kenneth A. Mines, Director of OCR, Region V, informed the District that it was deemed to be in violation of Titlte VI. Among other things

Mines charged the "District had pursued a policy of racially motivated employment and assignment of teachers and other professional staff" on the basis of race, that discriminatory assignment practices "effectively limited employment opportunities for black teachers by restricting the positions for which they were considered to those available at predominately black elementary schools", restricted and limited the opportunities of black teachers for promotion to administrative positions and regularly assigned less qualified teachers to predominantly black schools. Mines' letter of August 29, 1975 is attached as *Exhibit 1.*

3. On March 22, 1976 Martin H. Gerry, Acting Director Office for Civil Rights, Department of Health, Education and Welfare, notified the District as follows:

> "On August 29, 1975, Kenneth A. Mines, Director of our Regional Office, advised you that your District is not in compliance with Title VI of the Civil Rights Act of 1964 by virtue of your failure to provide equal educational services and opportunities to minority students, and by reason of the existence of racially motivated policies and practices with respect to the assignment of students and *the employment of faculty and other staff. . .*"

> "In addition, I am today notifying you that final approval of any application filed with this Department for Federal funds for new programs and activities is hereby ordered deferred. Your state education agency is also being notified that the commitments of Federal financial assistance for all new activities are likewise to be deferred. . ."

See *Exhibit 2* hereto attached.

4. On March 22, 1976 John W. Porter, Michigan Superintendent of Public Instruction, was notified by OCR-

HEW that federal assistance to the District had been ordered deferred—*Exhibit 3.*

5. On May 17, 1976 Robert Hornberger, Director of Department Services for Michigan's Department of Education, notified the District that federal assistance funneled through the State Department would be deferred—*Exhibit 4.*

6. On May 21, 1976 Lloyd R. Henderson, Director of Elementary and Secondary Education Division of OCR-HEW, advised the District that the Education/Desegregation Plan adopted by the Flint Board of Education on April 7, 1976 was unacceptable as a remedy to the non-compliance problems of the District under Title VI for numerous reasons set forth in full in the letter. Included among his requirements was faculty reassignment so that the racial composition of the teaching staff of each school was the same as the racial composition of the teaching staff of the District as a whole, (the so-called Singleton ratio)[1] and a method of monitoring faculty assignments to insure continued compliance with Singleton ratios. In addition Henderson said:

> "Therefore, the district's plan must make it clear that the process of assigning a specific number of teachers to individual schools will not limit the future employment opportunity of any applicant. The provision should clarify the distinction between the employment process and the process of assignment and eliminate misunderstandings that otherwise might arise. For example, the plan might contain a policy statement to the effect that the district, through its personnel

---

1. Singleton v Jackson School District, 419 F2d 211 (Fifth Circuit 1967)

> procedures, will continue its attempt to increase the number of minority teachers and principals and that as the district-wide percentage of minority teachers changes, appropriate reassignments will be made."

Henderson's letter of May 21, 1976 is attached as *Exhibit 5.*

B.

Administrative Enforcement Proceedings

7. On March 24, 1976, following the deferral order issued by the Acting Director of OCR on March 22 (Exhibit 2); General Counsel for the Department of Health, Education and Welfare commenced compliance proceedings for the termination of federal financial assistance to the District by filing a "Notice of Opportunity for Hearing", including charges of violation of Title VI essentially the same as those contained in Mines' letter of August 29, 1975 (Exhibit 1). A copy of the Notice of Opportunity for Hearing is attached as *Exhibit 6.*

8. Following pre-trial conferences with Administrative Law Judge Mast assigned to conduct the proceedings and various motions, the matter came on for hearing in April of 1977. The Administrative Law Judge issued his decision October 6, 1977—*Exhibit 7.* Judge Mast found that the District subjected and continued to subject to discrimination, persons on the ground of race and color, within the meaning of the Act (Title VI) as amended by the following:

> "a. Respondent Flint historically engaged in conduct, continued after 1964 and continues at present to engage in conduct and vestiges of Respondent's pre-1964 conduct continued after 1964 and continues at present, to segregate black students into certain

schools and maintain other schools as white in enrollment as long as possible, which may be more fully described as follows:

(1) neighborhood school policies;

(2) school site selection;

(3) changes in school attendance zone boundaries; and

(4) adjustment of school assignments inconsistent with school capacities.

b. Respondent Flint historically operated, continued after 1964 and continues to operate a school system identified by substantial segregation of race and color of students assigned.

c. Respondent Flint historically assigned, and continued after 1964 until January, 1977, to assign Black teachers and supervisors to schools which were identified by predominant enrollment of Black students.

d. Respondent Flint historically operated, continued after 1964 until 1977 to operate a school system identified by substantial segregation by race and color of teachers and supervisors assigned." See pg. 115 of the Decision.

9. The Administrative Law Judge established a plan which he said would bring the District into compliance with the requirements of Title VI. After providing for pairing of schools to further integrate the student bodies he said on page 114 of the Decision:

"Although Respondent Flint achieved compliance with *Singleton* in 1977, the compliance is concluded to be as a result of this case. Accordingly, desegregation should require a commitment from Respondent Flint to maintain compliance with *Singleton* in the future.

Discrimination in employment of teachers has not been established. No remedy, thus, can be required on this allegation. As noted, since 1960 Respondent Flint ap-

pears to have engaged in an effective affirmative action plan in the employment of Black teachers. For the same reason, no remedy can be required for the alleged discrimination in promotions of blacks to supervisory teachers since 1964, and for the alleged discrimination in assignment of lower qualified teachers to predominantly Black schools."

10. The statistical data upon which the Administrative Law Judge relied in part in reaching his decision is recited in detail on pages 73 through 100 of the Decision, and the census figures for the years 1930 through 1970 may be found on page 37 of the Decision. The 1980 census for the City of Flint shows that the white population of the City was 89,647 or 56.2% of the total population. 66,124 or 41.4% of the City's residents were black. The remainder were other minorities.

In the same year (1980) 12,649 or 37.6% of the District's students were white, 19,902 or 59.2% were black. The remainder were Indian, Asian and Hispanic.

In 1980 1,278.8 teachers or 68.1% were white, 581.7 or 31% were black, 17 or .9% were other minorities.

In the current school year (1982-83) the District has 11,243 or 35.6% white students, 19,345 or 61.3% black students and the remainder are other minorities.

In the current school year 1,181.7 or 66.8% of the District's teachers are white and 565.5 or 32% are black. The remaining 22 or 1.2% of the staff are Indian, Asians or Spanish.

Charts showing the racial distribution of staff and students in the Flint School System in the years 1950 through 1975 are attached as Exhibits 8, 9 and 10.

C.

Teachers and Counselors

11. Counselors are teachers. They are members of the teacher collective bargaining unit (United Teachers of Flint). They are paid on the same salary scales and receive the same fringe benefits. Throughout the HEW enforcement proceedings no distinction was made between counselors and teachers and no special consideration was given to counselors.

12. The track record of the District was worse with respect to the hiring of minority counselors than minority teachers. The first black teacher was hired by the District in 1943. The first black counselor was hired by the District in 1963, 20 years later. In 1965-66 of 55 counselors 3 or 5.45% were black. In 1966 of 60 counselors 2 or 3.33% were black. In the last mentioned year of 816 teachers 89 or 11% were black. Similar comparisons can be made in other years with like result until approximate parity was reached.

It is true, as the Administrative Law Judge found, that the District adopted the Singleton ratio for assignment of teachers in an effort to satisfy the requirements of OCR-HEW, and the District in keeping with the findings of the Administrative Law Judge and its commitments to HEW and the Department of Justice has continued to utilize the Singleton ratio in the assignment of teachers (including counselors). In addition the District has attempted to maintain a counseling staff that, as a self-contained unit, approximates the Singleton ratio and permits the assignment of at least one black counselor to each school.

It appeared in 1976 or thereabouts that neither objective could be attained in times of staff reductions if seniority were the only criteria for retention of counselors. See, attached seniority list. Exhibit 11. To meet what they believed to be the needs of the students of the District and at the same time to effect substantial compliance with Singleton principles, the Board of Education and the United Teachers of Flint in 1979 negotiated the following provision which has remained a part of the Master Teacher Contract since that time:

Article XIV, I

"If layoffs are to occur, a seniority list in accordance with this paragraph shall be prepared by the Board and a copy thereof be given to the UTF.

It is understood that should the Board determine to reduce staff among positions requiring more than a work year of thirty-nine (39) weeks as determined by the teacher's individual contract of employment (e.g., academic counselors, librarians) said reduction will be made in accord with the provisions of Article XIV, F-1; -2; -3 (herein defined) for 40 week employees for purposes of lay-off from 40 week employment to 39 week employment is a plus five percent from the ratio of minority teachers to majority teachers in the secondary level teacher labor pool in existence at the time of lay-off); -5 and Provision G, subject to the following limitations:

A teacher assigned to one of the aforesaid positions and who is laid off from a 40-week position and transferred into a 39-week position under Provisions F and G of this Article shall be granted an extra week's work in some appropriate capacity for one (1) year subsequent to the layoff.

The above provision will not be used to circumvent seniority (e.g., laying off a more senior minority counselor to retain a less senior minority counselor).

> Additionally, if the area reduced is restaffed (moving toward the number the area was at before the decrease) district wide, the teacher(s) transferred out shall be guaranteed return to the area on the basis of seniority (last out, first back) for a period of three years."

See Master Teacher Contract for the period September 1, 1979-August 31, 1982 and September 1, 1982-August 31, 1985 submitted herewith.

D.

Deferral, Termination and Litigation

13. In September, 1976 the Board of Education brought a suit in this Court against HEW, the Secretary of the Department of Health, Education and Welfare, the Acting Director of the Office for Civil Rights and Administrative Law Judge, James L. Mast, seeking relief from continued deferral of federal assistance and other relief (Civil No. 76-40098). After a hearing the Court on September 30, 1976, the Honorable James Harvey presiding, issued an Opinion and Order dismissing the cause for want of jurisdiction.

After the decision of Administrative Law Judge Mast (Exhibit 7), the Office for Education, Department of Health, Education and Welfare, denied the School District's application for Emergency School Aid Act (ESAA) assistance because of Mast's decision to terminate federal funds for the District. The District facing the loss of several millions of dollars instituted action in this Court seeking injunctive and other relief (Civil Action No. 78-40111). A preliminary injunction was issued enjoining HEW and other government agencies from encumbering

or disposing of funds otherwise available for the District under ESAA.

During the same period of time the Office for Civil Rights referred the Flint case to the Justice Department. The Justice Department then instituted suit against the Board of Education in this Court (Civil Action No. 80-40075). A settlement was reached and pursuant to that settlement a Consent Judgment was issued. Thereafter appropriate orders were issued by OCR-HEW and the Justice Department setting aside deferral and termination orders and the District received that portion of ESAA funds allocated to it and has functioned under the Consent Judgment and the other findings of Administrative Law Judge James Mast since that time.

14. The last two mentioned actions did not involve the employment practices of the District with respect to its teachers inasmuch as that matter was resolved by the Judge Mast's findings that the District had engaged in affirmative action to increase the number of minority employees on staff and by reassigning pursuant to the Singleton ratio. However, the first mentioned suit in this Court did involve the employment practices of the District and the government continued to insist throughout the hearing before Administrative Law Judge Mast in 1977 that the District was guilty of employment practices constituting violations of Title VI of the Civil Rights Act of 1964.

Reference to the Court file is requested.

E.

Impact of Adverse Ruling

15. In the current school year (1982-83) the District employs 44 counselors of whom 15 or 34% are black. The

District has six middle schools (junior high schools), three combined middle and senior high schools and four high schools.[2] Black students attend each of the 13 middle and senior high schools, and a black counselor is assigned to each school.

Plaintiff and three other white counselors who have been transferred to the classroom have more seniority than the four black counselors having the least seniority. If the white counselors are returned to counseling positions the four black counselors will be reassigned to classroom positions leaving the District with 11 black counselors and 33 white counselors, a ratio of 25% black to 75% white, and the District will not be able to provide a black counselor for each of its middle and senior high schools.

16. Although counselors receive the same weekly salaries as teachers, under the Master Teacher Contracts applicable here counselors and certain other members of the bargaining unit represented by the United Teachers of Flint work 40 weeks per year instead of 39 weeks per year worked by classroom teachers. The contractual provisions recited above require the District to pay counselors and other members of the bargaining unit who work 40 weeks in a year for 40 weeks work in a year succeeding transfer to a 39 week position. Plaintiff was a counselor in the 1979-80 school year. Thus he worked 40 weeks in that year. The following year (1980-81) he was transferred to a classroom position as an English teacher. In that year he worked 39 weeks and was paid for 40 weeks. In

---

2. Zimmerman Middle School will be closed in August, 1983 and thus is not considered in the count.

1981-82 plaintiff was again assigned to a counseling position from which he was transferred to a teaching position in the 1982-83 school year. Plaintiff worked 40 weeks in 1981-82 and he will be paid for 40 weeks in 1982-83 although he will work only 39 weeks. Thus at this point plaintiff has suffered no financial loss as a result of the transfers.

/s/ Stuart A. Boze
Executive Director of
Personnel Services

/s/ Roger K. Allen
Executive Director Labor Relations

/s/ Ledell Watson
Personnel Consultant Middle and
Senior High Schools

/s/ David Doherty
Director of Community Relations
and Grants

/s/ Robert L. Revis
Director of Research and Testing

STATE OF MICHIGAN)
) ss:
COUNTY OF GENESEE)

On this 11th day of March, 1983 before me, a notary public in and for Genesee County, Michigan, personally appeared, Stuart A. Boze, Roger K. Allen, Ledell Watson, David Doherty and Robert L. Revis, to me personally known, each of whom after being first duly sworn by me said:

1. He is employed by the School District of the City of Flint, Genesee County, Michigan;

2. He holds the position set forth above after his name;

3. He has knowledge of certain of the facts set forth in the foregoing Affidavit and can testify competently with respect thereto under oath if called upon to do so.

/s/ Nova J. Leonard
Notary Public,
Genesee County, Mich.
My Commission expires: 4-24-85

C. REES DEAN P12584
352 S. Saginaw St., Suite 510
Flint, MI 48502
(313) 767-1520

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action
No. 80-40349

STUART MARSH,

Plaintiff,

-vs-

BOARD OF EDUCATION OF CITY OF FLINT, et al,

Defendants.

_____/

BRUCE A. NEWMAN (P18268)
RICHARD J. DREW (P23729)
Attorneys for Plaintiff

_____/

THOMAS A. BAIRD (P29050)
Attorney for United Teachers of Flint

_____/

C. REES DEAN (P12584)
Attorney for Defendants, Board of Education and Macksood

_____/

AFFFIDAVIT IN SUPPORT OF OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Being duly sworn, now comes Plaintiff, STUART MARSH, and states as follows:

1. That on September 1st of 1980, the Affiant was fifty-six (56) years of age.

2. That Affiant has been assigned as a student counselor in the Flint school district since September of 1969.

3. That Affiant has earned his certification as a counselor from the State of Michigan by meeting academic requirements above and beyond that of a classroom teacher.

4. That on or about September 1st, 1980, Affiant was forced to suffer a material change in the conditions of his employment by virtue of his involuntary transfer back to the classroom.

5. That this abrupt change in the conditions of his employment represented a real demotion and a cause of great psychological stress to Affiant in the following particulars:

   (a) That he was transfered from one building to another and was forced to teach new subjects (e.g. English, Lab, Speech and History, which courses he had never taught before in his entire teaching career).

   (b) That he was required to teach a Civics course which he had not taught in over twenty years.

   (c) That Affiant has prepared and geared himself for a career in student counseling by obtaining a complete knowledge of the various types of counseling techniques and remaining current on information regarding financial aides, College Admissions, job opportunities,

etc., as well continuing professional reading and study in the area of counseling on a regular basis.

(d) That the constant change in subject matter resulted in substantial extra preparation when at the same time that Affiant had geared himself for the work of counseling.

(e) That Affiant did not have adequate resource background materials for the teaching of his new subject matter.

(f) That Affiant was assigned a variety of courses for which he was not properly prepared (e.g. Speech, English Lab, Reading, English, College Preparatory English, History of the United States, Civil War to Present, Civics and History—American Frontier).

(g) That Affiant had to undergo a major change of established work habits.

6. That on information of belief, Affiant believes that there is substantial damage to the educational process by virtue of the failure of the school board to utilize the Affiant's considerable expertise and experience in counseling and requiring him to teach subjects for which he is ill-prepared.

7. That there was additional damage to the educational process by virtue of utilizing less experienced counselors in place of Affiant.

8. That Affiant was forced to change buildings, from Bryant to Southwestern to Whittier within the Flint Public School System.

9. That seniority is essentially a racially neutral criteria for educational placement.

10. That based upon experience of Affiant, if a role model is necessary for minority students the same would best be utilized in the position of classroom teacher where the exposure to students is substantially more extensive than that as a counselor.

11. That Affiant has never been found wanting in his evaluations as a counselor and, in fact, has received the highest possible performance evaluations—even by minority principals who certainly are in a position to judge his ability to relate to minority students and to observe his interaction with minority students.

12. That Affiant has prepared himself by virtue of academic training and experience and extra-curricular activities to serve as a student counselor and that by virtue of the collective bargaining agreement between the Flint School Board and the Flint Teachers Union, he has been forced to suffer deprivation of that position.

13. That the Affiant, due to his age and the decline of student enrollment and consequent decline in number of counseling positions, is being forced to suffer permanent material change in his conditions of employment and in all probability will never be able to return to the position of counselor during his lifetime while others with less seniority will be allowed to remain in the protected counselor position.

14. That Affiant not only voted against the adoption of the collective bargaining agreement in question, but he was, in fact, ruled out of order by an official of the Defendant Union when he spoke against the agreement, since counselors were singled out for adverse treatment under the Affirmative Action program.

Further, Affiant sayeth not.

Dated: 4/14/83

/s/ Stuart Marsh, Plaintiff

Prepared by:

Bruce A. Newman, P.C. (P18268)
Attorney at Law
444 Church Street
Flint, Michigan 48502
Phone: (313) 232-4186

Subscribed and sworn to before
me this 15th day of April, 1983.

/s/ Linda G. Barnes
Notary Public, Genesee County, Michigan
My Commission Expires: 8/6/85

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Sixth Circuit Court of Appeals
Case No. 84-1240

U.S. District Court Case
No. 80 40349 (ED Mich)

STUART MARSH,

Plaintiff-Appellant,

-vs-

BOARD OF EDUCATION OF CITY
OF FLINT, et al,

Defendants-Appellees.

Clint Bolick
K. Preston Oade, Jr.
Maxwell A. Miller
Attorneys for Plaintiff-Appellant

C. Rees Dean (P12584)
Attorney for Defendants-Appellees
Board and Leo Macksood

Thomas A. Baird (P29050)
Attorney for Defendants-Appellees
United Teachers, Harold Keim and
Lane Hotchkiss

_____/

AFFIDAVIT IN SUPPORT OF DEFENDANTS-APPELLEES (BOARD OF EDUCATION) MOTION TO DISMISS

STATE OF MICHIGAN)
) ss:
COUNTY OF GENESEE)

STUART A. BOZE, being first duly sworn, says:

1. He is the Executive Director, Personnel Services for Defendant-Appellee Board of Education of the School District of the City of Flint (Board).

2. He has knowledge of the facts herein and, if sworn, can testify competently with regard thereto.

3. Stuart A. Marsh is a teacher in the School District of the City of Flint (District). He has been employed by the Board continuously since September 7, 1965. He has accrued seniority in the teacher bargaining unit since the date of his employment.[1] Since September, 1967, Mr. Marsh's employment has been governed by individual contracts and by collective bargaining agreements between the Board and Defendant-Appellee, United Teachers of Flint (UTF), the collective bargaining agent for Flint teachers.

4. On September 7, 1965 Mr. Marsh was assigned to Northwestern High School as a teacher of English. He continued to teach English, Homeroom or Foreign Relations until September, 1970.

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1. Seniority is systemwide seniority. Seniority accrues from the date of employment. Seniority does not accrue during unpaid leaves of absence. Mr. Marsh is charged with no unpaid leaves of absence. Therefore his seniority has accrued from the date of his employment.

5. In September, 1970 Mr. Marsh was assigned to a student counselor position. Student counselors are employed only in the secondary schools. He continued as a student counselor until the beginning of the 1980-81 academic school year.

6. In September, 1980 the Board reduced the number of student counselors from 52 to 48. Acting under affirmative action provisions of Article XIV of the collective bargaining agreement entitled "Vacancies, Transfers and Reduction in Staff", the Board transferred Mr. Marsh to a teaching position (English) at a secondary school.

7. The pertinent paragraphs of Article XIV are paragraphs F, G, H and I. The full text of these paragraphs is attached. Paragraph I permits the Board to ignore systemwide seniority in determining which counselors shall be laid off or transferred and consider only the District's over all instructional needs, teacher certification and qualifications and affirmative action goals.

The goal was a counseling staff includng a percentage of minorities that exeeceded by 5% the percentage of minority teachers to the total teaching staff (including counselors) in the secondary level teacher labor pool in existence at the time of layoff.

Affirmative action provisions did not, however, apply to filling of vacancies on the counseling staff. In the event of a vacancy or an increase in the number of counselor positions, laid off or transferred counselors are guaranteed the right to return to counseling on the basis of seniority (last out first back) for a period of three years.

8. In the 1981-82 school year Mr. Marsh exercised his senority rights to claim a counselor's position.

9. In the 1982-83 academic year he was again transferred to a teaching position. He remained in a teaching position during the 1983-84 academic school year.

10. Two counselors retired at the close of the 1983-84 academic school year, and on August 27, 1984 at the opening of the 1984-85 school year Mr. Marsh was reassigned to a counseling position.

11. The number of counselors employed by the School District is dictated by accreditation requirements of the North Central Accrediting Agency. A counselor may be assigned no more than 350 students.

12. The Board will employ 43 counselors in the 1984-85 academic school year. Affirmative action goals have been met. Each counselor's complement of students is at or near the allowed maximum (350).

13. Of the 43 counselors, the counselor having the most credited systemwide seniority was employed September 7, 1954, and the counselor having the least credited systemwide seniority was employed September 18, 1967. No persons, other than those already on the Board's payroll, have been employed as counselors since September 18, 1967. Her credited seniority dates from February 3, 1971.

13. Of the white counselors employed in the District in the 1984-85 school year, Mr. Marsh has the least credited seniority. Seven black counselors have less credited seniority than Mr. Marsh.

Given the age of the counseling staff[2] and thus the potential for a greater number of vacancies in the next few years; the fact that each counselor's student load is at or near the allowable maximum; and the increased number of students at the secondary level resulting from the addition of the ninth grade to the District's high schools accompanied by the adoption of a middle school plan, it is highly improbable that Mr. Marsh will be reassigned to a classroom teaching position during the remainder of his teaching career.

The current collective bargaining agreement expires Augsut 31, 1985. Whether the provisions of Article XIV challenged by Mr. Marsh in this action will be included in the next collective bargaining agreement has not yet been determined.

/s/ Stuart A. Boze

Subscribed and sworn to before me this
29th day of August, 1984.

/s/ Diane Johnson
Notary Public, Genessee County, Michigan
My Commission expires: 1-5-87

BELLAIRS DEAN COOLEY SILER & MOULTON
352 S. Sagniaw St., Suite 510
Flint, MI 48502 (313) 767-1520

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2. Three counselors are 63 years of age; four are between 60 and 63; seven are between 55 and 60.

SEP 13 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1859

In The

Supreme Court of the United States

October Term, 1984

STUART MARSH,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF FLINT, A Public Corporation; LEO MACKSOOD, individually and as President of the Board of Education of the City of Flint; UNITED TEACHERS OF FLINT, INC., a Michigan Corporation; HAROLD KEIM, individually and as President of United Teachers of Flint, Inc.; LANE HOTCHKISS, individually and as Chief Negotiator and Grievance Officer of United Teachers of Flint, Inc.,

Respondents.

PETITIONER'S BRIEF IN REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR CERTIORARI

K. Preston Oade, Jr.*
Bradley, Campbell & Carney
1717 Washington Ave.
Golden, Colorado 80401
(303) 278-3300

* Counsel of Record

Constance E. Brooks
Diane L. Vaksdal
Mountain States Legal Foundation
1200 Lincoln Street
Suite 600
Denver, Colorado 80203
(303) 861-0244

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

I. THE RACIAL QUOTA ADOPTED BY THE FLINT SCHOOL BOARD AND THE TEACHERS' UNION IS DESIGNED SOLELY TO MAINTAIN RACIAL BALANCE.

The Flint Board of Education has argued that Stuart Marsh's demotion, pursuant to a racial quota, is "a constitutionally permissible means" of maintaining enough black counselors to supply necessary educational services.[1] However, no decision of this Court has sanctioned the use of racial preferences in employment absent competent findings of discrimination. *See Regents of the University of California v. Bakke,* 438 U.S. 265 (1978). Maintenance of racial parity does not justify the use of a voluntary racial quota. *See United Steelworkers of America v. Weber,* 443 U.S. 193 (1979).

The Administrative Law Judge ("ALJ") specifically found that there has been no employment discrimination by the School Board. *See In the Matter of Flint Community Schools, et al.,* HEW Docket No. S-115 at 97-99 (1977). There was only a statistical disparity due to an insufficient number of qualified black teachers coupled with the constantly changing racial demographics of the student body. [*Id.* at 98, 99.] Thus, there is no past discrimination in employment to be remedied by the use of a racial preference.

If, as asserted by Respondents, this quota was adopted in response to findings of school segregation, then the plan must vindicate the students' rights. However, students do not have a right to a teaching staff of a particular racial composition. *Oliver v. Kalamazoo Board of Education,*

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[1]Respondent School Board's *Brief in Opposition to the Petition for Writ of Certiorari,* at 4. Hereinafter "School Board."

706 F.2d 757 (6th Cir. 1983). There is only a duty to a sustained good faith effort in hiring. [*Id.* at 762.]

The racial preference at issue was adopted in 1979, two years *after* the ALJ specifically found increased employment of black teachers due to effective affirmative action hiring. There was a sustained good faith effort toward full minority employment which did not require or justify adoption of the racial quota at issue.[2]

II. THE RACIAL QUOTA AT ISSUE VIOLATES PETITIONER'S RIGHT TO EQUAL PROTECTION OF THE LAWS.

The Respondents argue that Stuart Marsh was not injured by the operation of this racial quota. The School Board asserts that "Stuart Marsh was deprived of nothing to which he was entitled." *See* Respondent School Board's Brief at 8. The Union asserts that "Marsh was merely transferred from one position to another." *See* Respondent Union's Brief at 6. These characterizations are incorrect.

Stuart Marsh was demoted from his position as a school counselor. The inescapable conclusion is that the sole factor leading to his demotion was race. Respondents have never alleged nor attempted to prove that Marsh was asked to resume classroom duties because he was unqualified for his position. Rather, he was forced to give up his

[2]The Union has asserted that the record in this case is insufficient to judge "the educational and psychological importance of affirmative action in employment in public education." The School Board asserts the educational needs of black students without reference to any authority, whether legal, psychological, sociological, or otherwise. The record, or lack thereof, is not of Petitioner's making: it was the Respondent School Board's motion for summary judgment which precluded the possibility of developing record.

counseling position and assume the more onerous and less prestigious duties of a classroom teacher because he was white. Marsh was required to teach classes he had never before taught. Moreover, he no longer had the seniority to bid for placement as a counselor in one school. Instead, he had to accept two part-time counseling positions, even though he had more seniority than the black counselors retained in his stead.

There is nothing in the record that justifies imposition of this burden on Stuart Marsh. He has been denied equal protection, because there has been no determination that racial discrimination still existed when the preference was adopted. Moreover, Respondents never made any effort to tailor the remedy to specifically resolve racial disparity in employment without violating Stuart Marsh's constitutional rights.

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CONCLUSION

For the foregoing reasons, the Petitioner respectfully urges this Court to grant the Petition for Certiorari, and hear this case as a companion to *Wygant v. Jackson Board of Education*, No. 84-1340.

Respectfully submitted,

K. Preston Oade, Jr.*
Bradley, Campbell & Carney
1717 Washington Ave.
Golden, Colorado 80401
(303) 278-3300

Constance E. Brooks
Diane L. Vaksdal
Mountain States Legal Foundation
1200 Lincoln Street
Suite 600
Denver, Colorado 80203
(303) 861-0244

* Counsel of Record